Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

KAREN LECLERC, ET AL.,

Petitioners,

v.

DANIEL E. WEBB, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Louisiana has adopted a rule that excludes nonimmigrant aliens (aliens lawfully residing in the U.S. who do not hold permanent resident visas) from admission to the Louisiana Bar. That exclusion does not apply to immigrant aliens (aliens residing in the U.S. who hold permanent resident visas). A divided Fifth Circuit panel upheld the rule against an equal protection challenge after rejecting strict scrutiny in favor of the rational basis test. The Fifth Circuit also rejected a preemption challenge to the rule. It subsequently denied rehearing en banc by an 8-7 vote.

The questions presented are as follows:

1. Whether a burden imposed solely on nonimmigrant aliens lawfully residing in the United States, such as the Louisiana rule precluding such persons from Bar admission, is subject to strict scrutiny under the Equal Protection Clause, a question on which this Court granted certiorari but failed to reach in *Toll* v. *Moreno*, 458 U.S. 1 (1982), and which remains the subject of conflicting appellate decisions.

2. Whether the Louisiana rule excluding lawfully admitted nonimmigrant aliens from Bar admission is preempted by federal immigration law and policy.

RULE 14.1 STATEMENT

Petitioners (plaintiffs-appellants and cross-appellees below) are Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen D. Affleck.

Respondents (defendants-appellees and cross-appellants below) are Daniel E. Webb and Harry J. Phillips, in their capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions, respectively, and Jeffery P. Victory, Jeanette Theriot Knoll, Chet D. Traylor, Catherine D. Kimball a/k/a Kitty Kimball, John L. Weimer, and Bernette Joshua Johnson, in their official capacities as Justices of the Louisiana Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen D. Affleck respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 419 F.3d 405. The order of the court of appeals denying petitioners' petition for rehearing en banc (App., *infra*, 85a-89a), including the two opinions dissenting therefrom, are reported at 444 F.3d 428. The opinion of the district court (App., *infra*, 43a-84a) is reported at 270 F. Supp. 2d 779.

The Fifth Circuit consolidated this case on appeal with *Wallace* v. *Calogero*. The opinion of the district court in *Wallace* is reported at 286 F. Supp. 2d 748 (E.D. La. 2003). The *Wallace* plaintiffs are filing a separate petition for certiorari. Petitioners respectfully request that the two petitions be considered together.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2005. Petitioners' timely petition for rehearing en banc was denied on March 27, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Constitution provides: "nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Supremacy Clause of the Constitution provides, in relevant part: "This Constitution, and the Laws of the United

States * * *, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

STATEMENT

Introduction. This case raises two important issues of federal law—whether a state classification that disadvantages lawfully admitted nonimmigrant aliens is subject to strict scrutiny and whether a state's refusal to admit lawfully admitted nonimmigrant aliens to the state Bar conflicts with the federal authority over immigration. By answering these questions in the negative, the Fifth Circuit created conflicts with other courts and departed from this Court's precedents.

Louisiana prohibits lawfully admitted nonimmigrant aliens from admission to the state Bar, limiting Bar admission to citizens and immigrant aliens.[1] As a result, foreign nationals with law degrees from U.S. or foreign law schools who lawfully reside in Louisiana for many years under non-permanent visa classifications may not practice law in Louisiana even if they are otherwise eligible to do so. A divided Fifth Circuit rejected an equal protection challenge to the Louisiana rule, holding that it was subject only to rational basis rather than strict scrutiny review because "the level of constitutional protection afforded nonimmigrant aliens is different from that possessed by permanent resident aliens." App., *infra*, 2a. The court of appeals also rejected a Supremacy Clause challenge to the Louisiana rule, finding no conflict between federal authorization for nonimmigrant

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[1]An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Nonimmigrant aliens are lawfully admitted aliens who fall within one of the categories listed in 8 U.S.C. § 1101(a)(15). Immigrant aliens are all other lawfully admitted aliens. *Ibid.*; see *Elkins* v. *Moreno*, 435 U.S. 647, 664 (1978).

aliens to reside in this country and a state's refusal to allow nonimmigrant aliens to practice law. Seven judges dissented from denial of rehearing en banc, with Judge Higginbotham and Judge Stewart each authoring dissenting opinions.

The Fifth Circuit decision conflicts with those of other courts. As described below, the Fourth Circuit has held that a state classification that disadvantaged only nonimmigrant aliens was subject to strict scrutiny and violated the Equal Protection Clause of the Fourteenth Amendment. *Moreno* v. *University of Md.*, 645 F.2d 217, 220 (4th Cir. 1981), aff'd on other grounds, *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982). In addition, as further described below, the Supreme Court of Vermont held that a Vermont rule prohibiting nonimmigrant aliens from admission to the state Bar, a rule virtually identical to the Louisiana rule at issue here, violated the Supremacy Clause of Article VI. *Dingemans* v. *Board of Bar Examiners*, 568 A.2d 354, 357 (Vt. 1989).

The Fifth Circuit decision also is inconsistent with this Court's precedents. With respect to equal protection, the Court has repeatedly held that strict scrutiny applies to state alienage classifications. Applying that standard, it has struck down state regulations forbidding aliens to practice law (*In re Griffiths*, 413 U.S. 717 (1973)) and civil engineering (*Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976)), denying aliens financial assistance for higher education (*Nyquist* v. *Mauclet*, 432 U.S. 1 (1977)), and denying welfare benefits to aliens not meeting a residency requirement (*Graham* v. *Richardson*, 403 U.S. 365 (1971)). As for preemption, the Court repeatedly has protected "the preeminent role of the Federal Government with respect to the regulation of aliens within our borders" (*Toll* v. *Moreno*, 458 U.S. 1, 10 (1982)) and struck down state laws that "impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States." *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). As particularly relevant here, the Court in *Toll*

held that a state's denial of benefits to lawfully admitted nonimmigrant aliens, which were available to both citizens and immigrant aliens, was preempted by federal immigration law. 458 U.S. at 14-16.

The Court should resolve these conflicts, reject the Fifth Circuit's self-declared "nonimmigrant" exception to this Court's precedents requiring strict scrutiny of state discrimination against lawfully admitted aliens, and hold that Louisiana's bar on the practice of law by lawfully admitted nonimmigrant aliens violates both the Equal Protection and Supremacy clauses of the U.S. Constitution.

Factual Background. Louisiana Supreme Court Rule XVII § 3(B) ("§ 3(B)") requires that "[e]very applicant for admission to the Bar of this state shall * * * [b]e a citizen of the United States or a resident alien thereof." Prior to 2002, the Louisiana Supreme Court had interpreted the term "resident alien" to include all foreign nationals "lawfully within the United States." *E.g.*, *In re Appert*, 444 So.2d 1208 (La. 1984). In 2002, the court changed course and defined "resident alien" as aliens "who have attained permanent resident status in the United States," thereby excluding aliens lawfully residing in this country on a nonimmigrant visa. *In re Bourke*, 819 So.2d 1020, 1022 (La. 2002). As a result, nonimmigrant aliens, including petitioners, are ineligible for admission to the state Bar, notwithstanding that they otherwise qualify for admission.

Petitioners Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck are nonimmigrant aliens with degrees from foreign law schools. Under federal law, each is entitled to work temporarily in the United States. In addition, each would be qualified to seek admission to the Louisiana Bar were it not for their nonimmigrant status. Leclerc, Jarry, and Boulord are French citizens who were admitted to the U.S. on J-1 student visas. Boulord now holds an H-1B temporary worker visa. Affleck is a Canadian citizen

admitted to the U.S. on an L-2 spousal visa who has been issued an employment authorization document by the Department of Homeland Security.[2] Louisiana Supreme Court Rule XVII § 6(A) authorizes graduates of foreign law schools to obtain admission to the Bar if their education and training are "equivalent" to graduates of accredited U.S. law schools. Affleck applied for such an equivalency determination but was refused due solely to her nonimmigrant status. App., *infra*, 4a-5a. The other petitioners then decided not to file their planned applications which, as the district court found, would have been futile. *Id.* at 54a-55a.

In March 2003, petitioners sued members of the Louisiana Supreme Court and the Louisiana Committee on Bar Admissions (collectively the "State officials") in their

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[2]A J-1 student visa is available to "an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill * * * who is coming temporarily to the United States * * * for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training." 8 U.S.C. § 1101(a)(15)(J). An L-2 spousal visa is available to an alien spouse of an "alien who, within 3 years preceding the time of his application * * *, has been employed continuously for one year by a firm * * * and who seeks to enter the United States temporarily in order to continue to render his services to the same employer * * * in a capacity that is managerial, executive, or involves specialized knowledge." *Id.* § 1101(a)(15)(L). An H-1B temporary work visa is available to an alien "who is coming temporarily to the United States to perform services * * * in a specialty occupation." *Id.* § 1101(a)(15)(H)(i)(b). An employment authorization document authorizes a nonimmigrant alien "to be employed in the United States without restrictions as to location or type of employment." 8 C.F.R. § 27a.12(a).

official capacities pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, violations of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of Article VI. App., *infra*, 5a.

Proceedings Below. The district court granted the State officials' motion to dismiss and denied petitioners' motion for summary judgment. According to the court, this Court has applied strict scrutiny only in cases involving permanent resident aliens, and it concluded that nonimmigrant aliens differ from citizens and permanent resident aliens in that their admission is temporary and for a limited purpose. App., *infra*, 73a. It therefore applied a rational basis standard, upholding § 3(B) on the ground that legal representation by aliens holding non-permanent visas would be subject to disruption if the lawyer left the country. *Id.* at 75a-76a. The court also rejected petitioners' preemption claim on the ground that § 3(B) does not specifically conflict with federal immigration law or Congressional policy. *Id.* at 78a-79a.

A different result was reached in a virtually identical case brought by other nonimmigrant aliens. In *Wallace* v. *Calogero*, 286 F. Supp. 2d 748, 762-764 (E.D. La. 2003), a different district court judge granted summary judgment to the plaintiffs on their equal protection challenge to § 3(B). Construing this Court's precedents, in particular the analogous *Griffiths* case, the *Wallace* court held that "the justification for applying strict scrutiny to immigrant resident aliens applies as forcefully to nonimmigrant resident aliens." *Id.* at 762-763. Applying strict scrutiny, the court concluded that § 3(b) was not the least restrictive means to achieve a compelling state interest because "[n]onimmigrant aliens as a class are not necessarily more transient than other groups," and the Louisiana rule excludes only "a fraction of persons who may have temporary residence in the state." *Id.* at 763.

The Fifth Circuit consolidated the two cases for appeal. While recognizing "some ambiguity in Supreme Court

precedent," the court held that "nonimmigrant aliens are not a suspect class" and that classifications disadvantaging them are not subject to strict scrutiny. App., *infra*, 12a-21a. It opined that this Court's precedents, including *Griffiths*, addressed "only state laws affecting permanent resident aliens" and deemed the distinction between immigrant and nonimmigrant aliens "paramount," resting on the "temporary connection" of nonimmigrant aliens to this country and their "more constricted" status as compared to that of immigrant aliens. *Ibid.* The court therefore held that state discrimination claims by lawfully admitted nonimmigrant aliens are subject only to rational basis review. *Id.* at 21a. It concluded that § 3(B) bears a rational relationship to legitimate state interests because it assures clients that licensed attorneys in Louisiana will provide "continuity and accountability in legal representation." *Id.* at 23a.

The Fifth Circuit also held that § 3(B) is not preempted by federal law. It opined that Louisiana's denial of Bar admission to lawfully admitted nonimmigrant aliens is "in accord, rather than conflict, with federal regulation of alien employment" because it "affects a class of persons whom Congress has expressly prohibited from living or working permanently in the United States." *Id.* at 31a-32a.

Judge Stewart dissented from the panel's equal protection ruling. He noted that this Court has not distinguished between lawfully admitted immigrant and nonimmigrant aliens when applying strict scrutiny to state alienage classifications. App., *infra*, 36a. He would have struck down § 3(b) because aliens are a suspect class, nonimmigrant aliens are "part of that class," and § 3(b) "is directed at aliens and only aliens are harmed by it." *Id.* at 34a.

The Fifth Circuit subsequently denied petitioners' request for rehearing en banc by a vote of 8 to 7. *Id.* at 85a. There were two dissenting opinions.

Judge Higginbotham, writing for all seven dissenting judges, criticized the panel majority for "judicially crafting a subset of aliens, scaled by how it perceives the aliens' proximity to citizenship," a step "not sanctioned by Supreme Court precedent." App., *infra*, 87a. He recognized widespread opposition to classifying aliens as an insular minority either because "the unique federal interest in regulating aliens offers a superior rationale for strict scrutiny than the aliens' insular status" or because "the insular status of aliens exists only as a consequence of valid federal law," but explained that this Court has rejected each of those arguments. *Id.* at 87a-88a. Judge Higginbotham criticized the panel majority's silence with regard to the "trumping constitutional power of the federal government in controlling * * * matters of immigration," which "the Supreme Court has pointed to as itself demanding strict scrutiny of state regulations of persons whose presence in the country is lawful under federal law." *Id.* at 88a-89a. By deeming strict scrutiny inappropriate for aliens lawfully admitted with a limited tenure, the panel majority, according to Judge Higginbotham, "relaxes scrutiny of state regulation of aliens as the federal regulation of them is increased" and "shifts responsibility from the Congress to the States," a "perverse" result that he called "exactly backwards." *Id.* at 88a.

Judge Stewart, in addition to signing on to Judge Higginbotham's dissent, penned an additional dissent of his own, joined by four other judges. He reprised his reasons for dissenting from the panel majority decision and stressed "the far reaching consequences of the panel's holding." App., *infra*, 89a.

REASONS FOR GRANTING THE PETITION

The Court's review is required to resolve conflicts among the lower courts over the proper level of scrutiny accorded to claims of state discrimination against nonimmigrant aliens

and over federal preemption of state rules precluding nonimmigrant aliens from Bar admission. The ruling below circumvented this Court's precedents by creating a "nonimmigrant" exception to the longstanding requirement that state alienage classifications be scrutinized strictly. Such an exception would have a severe impact on nonimmigrant aliens residing lawfully in this country and would interfere with the federal government's supreme authority over immigration and aliens. The proper standard on challenges to state alienage classifications has been a subject of intense debate within the Court for decades, leading to numerous and in some cases passionate dissents.[3] This case provides an ideal opportunity to clarify any "ambiguity" in this Court's precedents (App., *infra*, 12a) and to provide guidance to the lower courts on the proper standards when reviewing state alienage classifications.

I. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THE FOURTH CIRCUIT AND STATE COURTS OF LAST RESORT.

A. The Fifth Circuit Has Created A Conflict Over The Proper Level Of Scrutiny When A State Discriminates Against Nonimmigrant Aliens.

The Fifth Circuit's decision in this case creates a conflict with a decision of the Fourth Circuit over the proper level of scrutiny on equal protection challenges to discrimination against nonimmigrants.

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[3]See *Toll* v. *Moreno*, 458 U.S. 1, 44-47 (1982) (O'Connor & Rehnquist, JJ., separately dissenting); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977) (Burger, Powell, & Rehnquist, JJ., separately dissenting); *Elkins* v. *Moreno*, 435 U.S. 647 (1978) (Rehnquist, J., dissenting); *Examining Bd. of Eng'rs* v. *Flores de Otero*, 426 U.S. 572 (1976) (Rehnquist, J., dissenting); *In re Griffiths*, 413 U.S. 717 (1973) (Burger, J., dissenting); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (Rehnquist, J., dissenting).

In *Moreno* v. *University of Md.*, 645 F.2d 217 (4th Cir. 1981), the Fourth Circuit held that a state university's policy of denying in-state status to "nonimmigrant aliens," which required them to pay higher tuition and fees than citizens and immigrant aliens, was subject to strict scrutiny and violated the Equal Protection Clause. *Id.* at 220. The court also affirmed the district court's ruling that the state policy was preempted under the Supremacy Clause because it "constituted state interference with the federal prerogative over immigration." *Ibid.* This Court granted certiorari on both questions and affirmed on the preemption ground without reaching the equal protection ground. *Toll* v. *Moreno*, 458 U.S. 1, 9-10 (1982). Therefore, it remains the law in the Fourth Circuit that nonimmigrant aliens, such as the *Moreno/Toll* plaintiffs and petitioners here, are within a suspect class entitled to strict scrutiny when challenging state regulations that discriminate against nonimmigrant aliens. See *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (explaining that court of appeals' prior holding remained viable after Supreme Court affirmed on alternative ground). Federal district courts also are divided over this question. Compare *Tayyari* v. *New Mexico State Univ.*, 495 F. Supp. 1365, 1372-1373 (D.N.M. 1980) (state discrimination against nonimmigrant aliens is subject to strict scrutiny), with *Ahmed* v. *University of Toledo*, 664 F. Supp. 282, 286 (N.D. Ohio 1986) (state discrimination against nonimmigrant aliens is not subject to strict scrutiny), appeal dismissed as moot, 822 F.2d 26 (6th Cir. 1987).

As further evidenced by the division between the district court in this case and the district court in *Wallace*, and by the 8-7 division within the Fifth Circuit, this Court's guidance is needed to clarify the proper level of scrutiny into claims of state discrimination against nonimmigrants. This case presents an excellent opportunity to resolve the strict scrutiny issue that the Court found unnecessary to reach in *Toll*.

B. The Fifth Circuit Has Created A Conflict Over Whether Federal Law Preempts State Rules Precluding Nonimmigrant Aliens From Bar Admission.

The Fifth Circuit's decision directly conflicts with the ruling of a state court of last resort over whether a state rule denying Bar admission to qualified nonimmigrant aliens is preempted by federal immigration law.

In *Dingemans* v. *Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989), the Supreme Court of Vermont addressed a Vermont rule that, like the Louisiana rule at issue here, required that Bar admission applicants be either a citizen or "an alien who has been lawfully admitted to the United States for permanent residence." *Id.* at 354. The plaintiff was a Dutch lawyer residing temporarily in the U.S. on an H-1 visa. *Id.* at 355. The court noted that "the federal immigration program contemplates that a nonresident immigrant attorney may engage in the practice of law in this country," the plaintiff would have been entitled to admission to the Vermont Bar if not for the state restriction, and the scope of her visa was a matter "to be resolved strictly between herself and the federal government." *Id.* at 356. The court concluded that the state rule "imposes a burden on the federal immigration program that could not have been intended by the Congress" and was therefore preempted pursuant to the Supremacy Clause. *Id.* at 357.

Another state court of last resort reached a similar conclusion in analogous circumstances. In *Alaska Dept. of Revenue* v. *Andrade*, 23 P.3d 58, 61 (Alaska 2001), the Supreme Court of Alaska addressed a state statute that limited alien eligibility for a state benefit to those "lawfully admitted for permanent residence in the United States." Applying this Court's *Toll* decision, the court explained that "a restriction that categorically excluded nonrestricted nonimmigrants from [benefit] eligibility would be

unconstitutional." *Id.* at 74. The court held that the challenged statute was not preempted only because the state defined "lawfully admitted for permanent residence" to comprise nonimmigrant aliens who were not precluded from forming the intent to remain indefinitely, obviating any conflict with federal immigration law. *Id.* at 76. The court noted, however, that an implementing regulation that was in place when the action commenced would have been preempted had it not been repealed because it proscribed all nonimmigrant aliens lawfully admitted under federal immigration law from eligibility for the benefit. *Id.* at 78.

The Fifth Circuit's ruling conflicts with these decisions. This Court's review is required both to resolve these conflicts and to provide guidance to the lower courts on important issues of federal law.

II. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT AND SHOULD BE REVERSED.

A. The Fifth Circuit's Ruling Conflicts With This Court's Equal Protection Precedents Requiring Strict Scrutiny Of State Alienage Classifications.

This Court has repeatedly held that "classifications based on alienage [are] inherently suspect and subject to close judicial scrutiny." *Graham*, 403 U.S. at 372; accord *Nyquist*, 432 U.S. at 7; *Flores de Otero*, 426 U.S. at 602; *Sugarman*, 413 U.S. at 642. As the Court explained in *Graham*, "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom judicial solicitude is appropriate." 403 U.S. at 372.

The Court's alienage decisions requiring strict scrutiny have not relied on technical immigration classifications. Instead, the Court has drawn a line between *lawfully admitted* aliens and *illegal* aliens. Compare *Flores de Otero*, 426 U.S. at 602 (the Court's strict scrutiny decisions apply to

"lawfully admitted aliens"); *Takahashi*, 334 U.S. at 420 (equal protection extends to "all persons lawfully in this country"), with *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982) (rejecting claim "that 'illegal aliens' are a 'suspect class'" subject to strict scrutiny in part because "entry into the class is itself a crime"). Because nonimmigrant aliens (including petitioners) are lawfully present in this country, the Fifth Circuit should not have rejected strict scrutiny as the proper standard on claims of discrimination against nonimmigrants.

In particular, the Fifth Circuit should not have rejected the applicability of *In re Griffiths*, 413 U.S. 717 (1973), in which this Court held that a state ban on the practice of law by lawfully admitted aliens is subject to strict scrutiny and violates the Equal Protection Clause. Griffiths, a Dutch citizen residing in the U.S. with no intent to seek U.S. citizenship, challenged a Connecticut rule that prohibited alien attorneys from admission to the state Bar. Although she was a permanent resident alien, the Court's holding did not turn on that status. In fact, the term "immigrant alien" or "permanent resident alien" does not appear in *Griffiths*. Instead, the Court consistently used the term "resident alien" (*e.g.*, *id.* at 722-723), a category that "includes both immigrant and nonimmigrant aliens" who lawfully reside in the U.S. *Wallace*, 286 F. Supp. 2d at 762.[4]

The Court in *Griffiths* recognized that states have "a substantial interest in the qualifications of those admitted to

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[4]The term "resident alien" is not defined in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*. By its terms, it comprises both immigrant aliens, defined in the Act as aliens granted permanent residence in the U.S., and nonimmigrant aliens, defined in the Act as aliens granted temporary residence in the U.S. See 8 U.S.C. § 1101(a)(15). As Judge Stewart observed below, both immigrant and nonimmigrant aliens are "resident aliens" because both reside lawfully in the U.S. App., *infra*, 35a-36a.

the practice of law," but ruled that use of a "suspect classification" such as alienage is unnecessary to safeguard that interest. *Griffiths*, 413 U.S. at 725. Instead, states must gauge the fitness of a Bar applicant "on a case-by-case basis" and consistent with appropriate requirements to vindicate their professional standards, such as training, familiarity with state law, and oaths. *Id.* at 726-727. A similar case-by-case inquiry would be a more narrowly tailored way of determining whether a particular alien who does not enjoy permanent resident status is likely to be able to provide competent and stable representation to clients.[5]

The only distinction between the rule struck down in *Griffiths* and Louisiana's § 3(B) is that the latter applies only to a subclass of lawfully admitted aliens. But this Court has rejected justifications for discrimination that apply "only within the class of aliens." *Nyquist*, 432 U.S. at 8. The fact that a state law "is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 9; see also *id.* at 15 (Powell, J., dissenting) (recognizing that the state law struck down by the Court distinguished "between aliens who prefer to retain foreign citizenship and all others"); *Graham*, 403 U.S. at 367 (state law that denied welfare benefits only to aliens who resided in the U.S. for less than 15 years failed strict scrutiny test); *Takahashi*, 334 U.S. at 413 (striking down state law that banned only aliens "ineligible to citizenship" from obtaining a fishing license). Nor can strict scrutiny be denied on the ground that nonimmigrants chose

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[5]A "narrow exception" to strict scrutiny of alienage classifications, known as the "governmental function" or "political function" exception, applies to state burdens on voting, holding public office, and serving as law enforcement officers. *Bernal* v. *Fainter*, 467 U.S. 216, 220 (1984); *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979). The Court held in *Griffiths*, 413 U.S. at 728, that this exception does not apply to lawyers or bar admission rules; accord *Nyquist*, 432 U.S. at 11; *Flores de Otero*, 426 U.S. at 603.

that status. This Court rejected a similar argument in *Nyquist*, explaining that "the element of voluntariness in a resident alien's retention of alien status is a recognized element" in the Court's cases applying strict scrutiny to alienage classifications. 432 U.S. at 9 n.11 (citing cases).

The Fifth Circuit's ruling that § 3(B) is insulated from strict scrutiny because it discriminates against nonimmigrant aliens rather than immigrant aliens cannot be squared with the above precedent. The panel majority's attempt to limit this Court's alienage classification cases to those involving discrimination against permanent resident (*i.e.*, immigrant) aliens (App., *infra*, 13a) has no support in the Court's opinions, as both Judge Higginbotham and Judge Stewart explained in dissent. The decision below rests in part on a misquoted passage from *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978). According to the panel majority, *Foley* stated that "the state laws at issue in *Graham*, *Nyquist*, *de Otero*, and *Griffiths* warranted close judicial scrutiny because they took positions seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*." App., *infra*, 15a (emphasis in original). In fact, the portion of that passage preceding "because" does not appear in *Foley*, and the Court said nothing in *Foley* that purports to establish a causal link between permanent residency status and the Court's requirement that strict scrutiny be applied to alienage classifications.

To be sure, immigrant aliens may in some sense be closer than nonimmigrant aliens to citizenship, but that has never been a criterion for strict scrutiny of alienage classifications. Lawfully admitted nonimmigrant aliens are similarly situated to immigrant aliens in all respects relevant to equal protection analysis. The rationale for deeming aliens a discrete and insular minority is their "political powerlessness" (*Plyler*, 457 U.S. at 216 n.14), and nonimmigrant aliens are at least as politically powerless as immigrant aliens. In addition, aliens have historically been

subject to "institutionalized discrimination" in the form of state legislation "severely restricting [their] employment opportunities." Volker Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 Duke L.J. 871, 872. In particular, the "vast majority of states" at one time or another have "prevented noncitizens from practicing law" (*id.* at 883), restrictions that were equally applicable to immigrant and nonimmigrant aliens and that were struck down in *Griffiths*. Moreover, nonimmigrant aliens, like immigrant aliens, pay taxes and "contribute in myriad other ways to our society." *Griffiths*, 413 U.S. at 722; see App., *infra*, 37a. The Fifth Circuit's view that the "numerous variations" among nonimmigrant aliens prevent them from constituting a "discrete or insular" class (App., *infra*, 17a) misses the point. Petitioners do not contend that nonimmigrant aliens constitute a "discrete or insular" class but rather that they are part of the class of lawfully admitted aliens that this Court has consistently deemed discrete or insular and thereby subject to strict scrutiny. Furthermore, the status of *immigrant* aliens is marked by numerous variations as well.

Because the rational basis level of scrutiny applied by the court of appeals conflicts with this Court's precedents, the decision below should be reversed with instructions to apply strict scrutiny to § 3(B). The Louisiana rule cannot survive strict scrutiny. Whether or not commentators are right that "the Louisiana Supreme Court rule is motivated primarily by animus" (Kristin L. Beckman, Comment, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 Loy. L. Rev. 139, 141 (2005)), and will exacerbate a severe shortage of indigent defense lawyers, especially in death penalty cases (Note, *Fifth Circuit Holds That Louisiana Can Prevent Non-Immigrant Aliens from Sitting for the Bar*, 119 Harv. L. Rev. 669, 669, 676 & n.63 (2005)), Louisiana has no compelling interest in forbidding the practice of law by nonimmigrant aliens that it cannot protect through less

restrictive means. See *Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 283-287 (1985) (holding that state rule barring nonresidents from Bar admission violated Privileges and Immunities Clause and explaining that the state's asserted justifications were not "substantial" and could be protected "through less restrictive means"); *Griffiths*, 413 U.S. at 724 (rejecting notion that citizenship and alienage have any "relevance" to the "likelihood that a lawyer will fail to protect faithfully the interest of his clients").

A ban on the practice of law by all nonimmigrant aliens fails to appreciate that many nonimmigrant alien lawyers are quite capable of satisfying the state's legitimate interests in monitoring the legal profession, including protecting the stability of the attorney-client relationship. Unlike temporary visas issued to allow aliens to attend a conference or visit relatives, an H-1B visa is good for three years and may be extended for up to six years (8 C.F.R. § 214.2(h)(15)); holders of P-series visas may obtain extensions for up to ten years (*id.* § 214.2(p)(14)); and nonimmigrant holders of E-1 and E-2 visas may obtain an indefinite number of two-year extensions (*id.* § 214.2(e)(19),(20)). A nonimmigrant alien also may obtain permanent resident status under the "dual intent" doctrine (*id.* § 214.2(h)(16)) or by marrying a citizen or permanent resident alien (8 U.S.C. § 1153(a)). Griffiths, for instance, initially entered the U.S. on a non-permanent visa and became a permanent resident alien upon marrying a citizen *Griffiths*, 413 U.S. at 718 & n.1. A "case-by-case" inquiry (see *id.* at 725-727) is adequate to determine whether a particular nonimmigrant alien is unlikely to provide adequate and stable legal representation to clients.[6]

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[6]Even if the Court were to decide that rational basis is the proper level of scrutiny for alienage classifications directed to nonimmigrant aliens, it should hold that § 3(B) lacks a rational basis and therefore violates the Equal Protection Clause. There is no rational connection between the ability to function as an

B. The Fifth Circuit's Ruling Conflicts With This Court's Precedents Addressing Federal Preemption Of State Alienage Classifications.

Even if it could withstand equal protection analysis, § 3(B) would be preempted by federal immigration law. As Judge Higginbotham explained, another reason state alienage classifications should receive strict scrutiny is to ensure that they do not interfere with the supreme federal authority over immigration. App., *infra*, 87a-88a. Indeed, this Court has noted the view of commentators that "many of the Court's decisions concerning alienage classifications [are] better explained in pre-emption than in equal protection terms." *Toll*, 458 U.S. at 11 n.16.

The Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders." *Toll*, 458 U.S. at 10; see also *Graham*, 403 U.S. at 365; *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). Exercising that authority, Congress enacted the INA as "a comprehensive and complete code covering all aspects of admission of aliens to this country." *Elkins*, 435 U.S. at 664. "The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *DeCanas* v. *Bica*, 424 U.S. 351, 359 (1976). Accordingly, there exist "substantial limitations upon the authority of the States in making classifications based upon alienage." *Toll*, 458 U.S. at 10. States "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturali-

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attorney and one's status as an immigrant as opposed to a nonimmigrant alien. As this Court explained when striking down Puerto Rico's restrictions on alien engineers, even "United States citizenship is not a guarantee that a civil engineer will continue to reside in Puerto Rico or even in the United States, and it bears no particular or rational relationship to skill, competence, or financial responsibility." *Flores de Otero*, 426 U.S. at 606.

zation and residence of aliens." *Takahashi*, 334 U.S. at 419; see *Graham*, 403 U.S. at 380 (state laws that denied welfare benefits to lawfully admitted aliens were "inconsistent with federal policy" and "encroach[ed] upon exclusive federal power").

The decision below conflicts with these principles and in particular with this Court's decision in *Toll*. That case concerned a State university program that allowed citizens and immigrant aliens to obtain preferential tuition treatment by showing they were domiciled within the state but did not allow nonimmigrant aliens domiciled within the state to obtain that benefit. The Court held that the state's imposition of "discriminatory tuition charges and fees solely on account of the federal immigration classification" was preempted by federal law. 458 U.S. at 17. Here, too, § 3(B) constitutes a discriminatory classification that operates "solely on account of the federal immigration classification." By upholding that classification, the Fifth Circuit departed from *Toll*.[7]

In other cases, too, the Court has closely scrutinized state alienage classifications to ensure that they do not interfere with federal immigration law and policy governing aliens lawfully in the U.S. See *Graham*, 403 U.S. at 378 (state law burdening lawfully admitted aliens preempted); *Takahashi*, 334 U.S. at 419 (same). In *DeCanas*, 424 U.S. at 355, the Court held that a state statute forbidding employers from knowingly employing an illegal alien was not preempted because it addressed only "aliens who have no federal right to employment within the country." The Court made clear

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[7] *Toll* addressed only holders of G-4 visas deemed domiciled in the U.S. by federal immigration law. The Court observed that "when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute." 458 U.S. at 13. There should be no such dispute here. Each petitioner held a visa authorizing residence in the United States for an extended period.

that, in contrast, state regulation that "discriminates against aliens *lawfully admitted* to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Id.* at 358 n.6 (emphasis added). Section 3(B) indisputably is directed only at aliens lawfully admitted to the U.S. And whereas the statute in *DeCanas* sought "to protect the opportunities of lawfully admitted aliens" (*ibid.*), § 3(B) denies lawfully admitted aliens the opportunity to practice a profession for which they are otherwise qualified and therefore imposes "additional burdens not contemplated by Congress."

Louisiana's refusal to license lawfully admitted nonimmigrant aliens to practice law, based on a federal immigration classification that authorizes such aliens to live and work in this country, conflicts with the above precedents and with federal immigration law and policy. As the Court explained in *Takahashi*, 334 U.S. at 418-419, "[i]t does not follow [that] because the United States regulates immigration and naturalization in part on the basis of [certain] classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living."

The conflict between § 3(B) and federal immigration law is direct, not just a matter of abstract policy. For example, under federal law, an H-1B visa holder is admitted to this country to engage in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). A lawyer is such a "specialty occupation." 8 C.F.R. § 214.2(h)(4)(ii). Thus, federal law authorizes H-1B visa holders, such as petitioner Boulord, to work as lawyers, at the same time providing that they must obtain any state license required to practice that profession. 8 U.S.C. § 1184(i)(2)(A); 8 C.F.R. § 214.2(h)(4)(v). Louisiana's rule precludes nonimmigrant aliens from even seeking a state license and thereby conflicts with the predicate for this federal requirement—the assumption that

the states treat visa holders as at least *eligible* to obtain such licenses. Because § 3(B) "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" (*United States* v. *Locke*, 529 U.S. 89, 109 (2000)), it should be struck down pursuant to the Supremacy Clause.

Furthermore, denying qualified nonimmigrant aliens the right to practice their profession is "tantamount to the assertion of the right to deny them entrance and abode." *Truax*, 239 U.S. at 42; see also *Graham*, 403 U.S. at 380 (denying welfare benefits to noncitizens or conditioning them on longtime residency "equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode"). That remains the case even though § 3(B) does not preclude nonimmigrant alien lawyers from earning their living in some other way. If a state can forbid nonimmigrant alien lawyers from obtaining a license to practice law, it can forbid nonimmigrant aliens from obtaining licenses to engage in other lines of work as well. See *Truax*, 239 U.S. at 42-43 (sustaining restriction on alien employment would leave "no limit to the State's power of excluding aliens from employment").

The practical impact of the decision below is to force the departure of nonimmigrant alien lawyers desiring to practice law from Louisiana. "[T]hose lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." *Truax*, 239 U.S. at 42. Requiring nonimmigrant alien lawyers to either practice their profession outside Louisiana or not practice it at all cannot be reconciled with federal law, which does not limit the states in which a nonimmigrant alien may live and work. Such "auxiliary burdens" are "constitutionally impermissible" because they "encroach upon exclusive federal power." *Graham*, 403 U.S. at 379-380. This Court

should grant the petition to prevent states from encroaching on the federal authority to admit and regulate aliens.

III. THE RULING BELOW WILL CAUSE SERIOUS HARM UNLESS REVERSED.

As Judge Higginbotham recognized, the Fifth Circuit's ruling "shifts responsibility over aliens from the Congress to the States." App., *infra*, 88a. That shift results in "perverse" consequences. *Ibid.*

Of particular note, barring lawfully admitted nonimmigrant aliens from practicing law can only obstruct the growing transnational practice of law. Justice Rehnquist recognized over thirty years ago that a "large number of American nationals are admitted to the practice of law" abroad and that this number would "expand as world trade enlarges." *Griffiths*, 413 U.S. at 730 (Rehnquist, J., dissenting). Today, "[l]awyers performing international services routinely cross the lines between national legal systems." Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 Nw. J. Int'l L. & Bus. 487, 489 (2003). The United States exported $3.38 billion in legal services in 2003, while importing $879 million.[8] The integration of foreign lawyers into the fabric of increasingly global law firms "is made more difficult by restrictive rules of practice that complicate or limit the ability of firms to move lawyers among offices and nations to expose them to practice settings, core personnel and training experiences." Silver, *Regulatory Mismatch*, *supra*, at 489. Furthermore, "U.S. law schools increasingly look to foreign lawyers to fill their classrooms." Carole Silver, *Winners and Losers in the Globalization of Legal Services: Situating the*

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[8]United States Department of Commerce, Bureau of Economic Analysis, Table 1, Private Services Trade by Type, 1992-2003, cited in Laurel S. Terry, *Lawyers, GATS, and the WTO Accounting Disciplines*, 22 Penn. St. Int'l L. Rev. 695, 718 n.74 (2004).

Market for Foreign Lawyers, 45 Va. J. Int'l L. 897, 898 (2005). A JD degree from a U.S. law school will be much less attractive if nonimmigrant foreign nationals are forbidden to practice law in the U.S. upon graduation.

The Louisiana rule also is inconsistent with the goals of the General Agreement on Trade in Services ("GATS"),[9] a treaty to which the U.S. is bound as a member of the World Trade Organization. A primary goal of the GATS is to have member countries "accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service members." Art. XVII ¶ 1. Thus, the GATS aims to ensure that domestic licensing requirements are "not more burdensome than necessary to ensure the quality of the service" and "not in themselves a restriction on the supply of the service." *Id.* Art. VI ¶ 4. Specifically, the GATS aims "to encourage the United States and other members to liberalize prevailing rules to facilitate" authorization for "foreign lawyers to practice in the United States (and the other Member States)." Robert E. Lutz *et al.*, *Transnational Legal Practice Developments*, 39 Int'l Law. 619, 621 (2005). In light of the GATS, according to the U.S. Trade Representative, "[t]he United States is seeking broad removal of foreign barriers in sectors such as * * * legal services." Office of the U.S. Trade Representative, *Free Trade in Services: Opening Dynamic New Markets, Supporting Good Jobs* (May 31, 2005).[10] But "unless the United States can offer access to foreign lawyers, the USTR feels constrained from requesting such rights for U.S. lawyers abroad." Lutz, *supra*, at 624. The Louisiana rule

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[9]Available at http://www.wto.org/English/docs_e/legal_e/26-gats_01_e.htm.

[10]Available at http://www.ustr.gov/Document_Library/Fact_Sheets/2005/Free_Trade_in_Services_Opening_Dynamic_New_Markets,_Supporting_Good_Jobs.html.

represents a severe market access restriction at odds with the developing free global market in legal services.[11]

Moreover, the impact of the decision below will extend beyond the legal profession. The Fifth Circuit's reasoning would permit states to discriminate against nonimmigrant aliens when they confer benefits and impose burdens so long as they can articulate a mere rational basis for doing so. The ruling below thus opens the door for states to re-impose all the same discriminatory burdens previously struck down by this Court—provided that the discrimination affects only nonimmigrant aliens. Such discrimination not only would be inconsistent with equal protection principles but would represent a state-imposed reversal of federal immigration policy. It is no answer to say that, for now, this is the law only in the Fifth Circuit. The Fifth Circuit includes Texas, home to nearly 2 million lawfully present nonimmigrant aliens.[12] The harm already flowing from § 3(B) and sure to follow from the holding below should be confronted and stopped before it becomes irreparable.

The Court should be especially vigilant in today's political climate to ensure that nonimmigrant aliens, who are lawfully in this country but have no power at the ballot box, are not subject to invidious discrimination. Only a "strict scrutiny" test can separate legitimate restrictions from unjust

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[11]Such state restrictions are also likely to harm the interests of lawfully admitted aliens requiring legal representation. "Newly-arrived immigrants, faced with cultural and linguistic barriers, may find it especially helpful to retain an advocate who shares their ethnic heritage and has the ability to bridge the culture gap." Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 Seton Hall Const. L.J. 103, 131 (1996).

[12]See Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2004 Yearbook of Immigration Statistics, p. 123 Table 28 (Jan. 2006), available at http://www.uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf.

discrimination. Moreover, since 9/11 Congress and the federal immigration agencies have deliberately addressed the standards for allowing aliens to enter the United States and remain here for certain periods. If it were ever permissible for individual states to intrude themselves into federal immigration policy, this would surely not be such a time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Karen Leclerc; Guillaume Jarry;
Beatrice Boulord; Maureen D. Affleck,
Plaintiffs - Appellants - Cross Appellees,

v.

Daniel E. Webb, et al.,
Defendants

Daniel E. Webb; Harry J. Phillips, In Their Respective
Official Capacities as Chairman and Vice-Chairman of the
Louisiana Committee on Bar Admissions;
Jeffrey P. Victory; Jeannette Theriot Knoll;
Chet D. Traylor; Catherine D. Kimball, a/k/a Kitty Kimball;
John L. Weimer; Bernette Joshua Johnson, In Their
Official Capacities as Justices of the Louisiana
Supreme Court,
Defendants - Appellees - Cross Appellants.

Docket No. 03-30752

Caroline Wallace; Emily Maw,
Plaintiffs - Appellees,

v.

Pascal F. Calogero Jr., in his official capacity as
Chief Justice of the Louisiana Supreme Court;
Jeffrey P. Victory; Jeannette Theriot Knoll;
Chet D. Traylor; Catherine D. Kimball; John L. Weimer;
Bernette J. Johnson, in their official capacities as
Justices of the Louisiana Supreme Court;
Daniel E. Webb; Harry J. Phillips, Jr., in their

respective official capacities as Chairman and
Vice-Chairman of the Louisiana Committee on Bar
Admissions,
Defendants - Appellants

Docket No. 03-31009

July 29, 2005

Appeals from the United States District Court
for the Eastern District of Louisiana

Before JONES, SMITH, and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This appeal arises from two consolidated actions filed by nonimmigrant aliens whose status, according to Louisiana Supreme Court Rule XVII, § 3(B), renders them ineligible to sit for the Louisiana Bar.[1] The district courts disagreed whether the Louisiana rule impermissibly discriminates against the plaintiffs in violation of the Equal Protection Clause. Because the level of constitutional protection afforded nonimmigrant aliens is different from that possessed by permanent resident aliens, we hold that the Louisiana rule survives rational basis review.

BACKGROUND

I. Louisiana Bar Rule

Louisiana Supreme Court Rule XVII, § 3(B) ("Section 3(B)") requires that "[e]very applicant for admission to the

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[1] *LeClerc, et al. v. Webb, et al.*, 270 F. Supp. 2d 779 (E.D. La. 2003), and *Wallace, et al. v. Calogero, et al.*, 286 F. Supp. 2d 748 (E.D. La. 2003). We consolidated these cases for purposes of this appeal.

Bar of this state shall . . . [b]e a citizen of the United States or a resident alien thereof." Prior to the adoption of Section 3(B), Louisiana precedent defined "resident alien" as a "foreign national[] lawfully within the United States." *In re Appert*, 444 So. 2d 1208 (La. 1984). In 2002, the Louisiana Supreme Court overturned *Appert*, and held that the term "resident alien . . . appl[ies] only to those aliens who have attained permanent resident status in the United States." *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002). As interpreted in *Bourke*, Section 3(B) effectively prohibits the instant plaintiffs — nonimmigrant aliens[2] who are "not entitled to live and work in the United States permanently" — from sitting for the Louisiana Bar. *Bourke*, 819 So. 2d at 1022.

II. The *LeClerc* Plaintiffs

The *LeClerc* plaintiffs, Karen LeClerc, Guillame Jarry, Beatrice Boulord, and Maureen Affleck, are nonimmigrant aliens who hold degrees from foreign law schools and seek leave to sit for the Louisiana Bar. LeClerc and Jarry are French citizens admitted to the United States on J-1 student visas.[3] Boulord, also a French citizen, was initially admitted

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[2] The Immigration and Nationality Act distinguishes between immigrant and nonimmigrant aliens, negatively defining an immigrant alien as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." 8 U.S.C. § 1101(a)(15) [IMMLS PSD INA § 101]. An alien falling into one of fifteen exclusionary categories is a nonimmigrant alien, a class generally delimited by a lack of intention to abandon his foreign country residence and entry into the United States for specific and temporary purposes.

[3] Title 8 U.S.C. § 1101(a)(15)(J) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> having a residence in a foreign country which he has no intention of abandoning who is a bona fide student . . . is coming temporarily to the United States as a participant in a program . . . for the purpose of . . . studying . . . .

to the United States on a J-1 student visa, but currently remains in the United States on a H-1B temporary worker visa.[4] Affleck is a Canadian citizen initially admitted to the United States on an L-2 spousal visa,[5] but currently remains in the United States on an H-1B temporary worker visa.

As graduates of foreign law schools seeking permission to sit for the Louisiana Bar, each plaintiff was required to apply for an equivalency determination pursuant to Louisiana Supreme Court Rule XVII, § 6 ("Section 6").[6] Before the commencement of the *LeClerc* suit, Affleck applied for, and

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[4] Title 8 U.S.C. § 1101(a)(15)(H)(i)(b) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> is coming temporarily to the United States to perform services . . . in a specialty occupation . . . having residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee . . . in a training program that is not designed primarily to provide productive employment . . . .

Pursuant to the 1990 Act, an H-1B visa holder is no longer required to maintain "a temporary residence abroad which he or she has no intention of abandoning." *Steel on Immigration*, §3:13, 3-35. Nor is such a visa holder subject to the presumption of immigrant status. 8 U.S.C. § 1184(b). However, the nature of an H-1B visa holder's status in the United States is still temporary, the visa holder is still subject to a six-year admission cap (three years admission plus three years extension) notwithstanding, *inter alia*, a change in status. *Steel*, at 3:13, 3-73-74.

[5] Title 8 U.S.C. § 1101(a)(15)(L) [IMMLS PSD INA § 101], derivatively admits a nonimmigrant "alien spouse and minor child[] of [an L-1] alien."

[6] LR XVII, § 6 provides that:

> "An applicant who has graduated from a law school that is not located in the United States or its territories must submit an application for the Committee for an equivalency determination . . . ."

was denied an equivalency determination because her status did not comply with Section 3(B). The other plaintiffs filed for equivalency determinations after the suit commenced and were similarly refused. None of the plaintiffs appealed their equivalency denials as permitted by Louisiana Supreme Court Rule XVII, § 9 ("Section 9").[7]

On March 6, 2003, the plaintiffs filed suit, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1367, against the Louisiana Supreme Court[8] and the Chairman[9] and Vice-Chairman[10] of the Louisiana Committee on Bar Admissions (collectively "defendants") in their official capacities. The plaintiffs challenged the enforcement of Section 3(B) and sought declaratory and injunctive relief and attorneys' fees. They requested expedited discovery related to the adoption of Section 3 B), including records of the Louisiana Supreme Court's official meetings, processes, and opinions. The defendants moved to quash the plaintiffs' discovery requests, asserting judicial and legislative immunity. Finding the defendants judicially immune, a magistrate judge granted the motion. On April 17, 2003, the plaintiffs moved for summary judgment, and the defendants countered with a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim based, *inter alia*, on standing, ripeness, Eleventh Amendment, judicial and legislative immunity, and abstention grounds.

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[7] LR XVII, § 9 provides that:

> Upon notice . . . that applicant has failed to fulfill one or more of the requirements of . . . Section 6, . . . , the applicant may appeal by petition directly to the Court.

[8] Pascal F. Calogero, Jr., Jeffrey P. Victory, Jeanette T. Knoll, Chet D. Traylor, Catherine D. Kimball, John L. Weimer, and Bernette J. Johnson. The *LeClerc* plaintiffs did not name the Honorable Pascal F. Calogero, Jr., the lone dissenter in *Bourke*.

[9] Daniel A. Webb.

[10] Harry J. Phillips.

The district court partially granted the defendants' motion to dismiss, denied the plaintiffs' motion for summary judgment, and denied as moot the plaintiffs' appeal of the magistrate judge's discovery ruling.[11] While rejecting the defendants' jurisdictional arguments, the court held on the merits that: (1) Section 3(B) is not preempted by federal immigration for trade policy; (2) Affleck lacked standing to assert a claim under NAFTA;[12] (3) the plaintiffs failed to state a claim for violation of either procedural or substantive Due Process; and (4) applying rational basis review, Section 3(B) is rationally related to legitimate state interests, and, thus, constitutional. The district court denied plaintiffs' motion to reconsider on July 30, 2003.[13] Both parties timely noticed their appeals and cross-appeals.

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[11] The *LeClerc* plaintiffs appeal the discovery ruling, which this Court reviews for abuse of discretion. *In re Grand Jury Proceedings*, 115 F.3d 1240, 1243 (5th Cir. 1997). Because the plaintiffs' discovery requests border on the absurd, we find no such abuse.

[12] We affirm this ruling. As conceded in oral argument, Affleck, although a Canadian citizen, is not a beneficiary of NAFTA. Moreover, NAFTA limits enforcement to the Secretary of State and the United States Attorney General. Thus, even if a beneficiary of the treaty, Affleck has no private right of action thereunder.

[13] The plaintiffs appeal this ruling. We AFFIRM. We review a district court's denial of a motion for reconsideration for abuse of discretion. *Westbrook v. C.I.R.*, 68 F.3d 868, 879 (5th Cir. 1995). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments. *Westbrook*, 68 F.3d at 879. In their motion, not only did plaintiffs improperly re-argue the merits of their case, they also impermissibly asserted, for the first time, arguments under the General Agreement on Trade and Services ("GATS"), the Dormant Commerce Clause, and the right to travel. As such, we find no abuse of discretion in the court's denial on the basis of

III. The *Wallace* Plaintiffs

The *Wallace* plaintiffs' suit landed before a different federal district judge in New Orleans. Caroline Wallace and Emily Maw are nonimmigrant aliens who seek leave to sit for the Louisiana bar exam. Both are citizens of the United Kingdom who were admitted to the United States on temporary visas. Wallace holds an H-1B temporary worker visa and is licensed as an attorney in England and Wales. Wallace is currently employed doing non-attorney legal work. Maw was admitted to the United States pursuant to an F-1 student visa[14] and remains on an H-1B temporary worker visa.[15] Maw holds a law degree from Tulane University Law School in New Orleans and is currently employed as a paralegal.

Before filing suit, Wallace applied for an equivalency determination, and avers that after she was initially granted permission to sit for the Bar, permission was revoked for her noncompliance with Section 3(B). Although the record is unclear, Maw either applied to sit for the Bar exam or moved for admission by reciprocity. Either way, the defendants de-

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these errors. Moreover, having been improperly raised below, we will not consider on appeal the GATS, Dormant Commerce Clause, or right to travel arguments advanced by the plaintiffs.

[14] Title 8 U.S.C. § 1101(a)(15)(F) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> ha[s] a residence in a foreign country which he has no intention of abandoning, is a bona fide student qualified to pursue a full course of study and [] seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . .

[15] At oral argument, counsel represented that Maw is now an H-1B visa holder.

nied her application for lack of Section 3(B) qualification.[16] Neither plaintiff appealed her denial to the Louisiana Supreme Court pursuant to Rule 9.

On May 2, 2003, the plaintiffs filed a suit against the defendants, which is parallel in all relevant respects to the *LeClerc* action. However, their motion to consolidate their action with the *LeClerc* suit was inexplicably denied. Cross-motions for judgment followed as in *LeClerc*, but with different results.

The *Wallace* district court denied the defendants' motion to dismiss and partially denied the plaintiffs' motion for summary judgment. Like the *LeClerc* court, the *Wallace* court rejected the defendants' jurisdictional arguments. The court dismissed the plaintiffs' preemption claim, but denied their Due process Claim as moot. On the plaintiffs' Equal Protection claim, however, the court applied strict scrutiny review and held that because Section 3(B) is not the least restrictive means to achieve the state's asserted compelling interests, it is unconstitutional. Defendants timely noticed their appeal.

The two cases are consolidated on appeal in this court. Because the issues raised are nearly identical, any references to plaintiffs in the following discussion include, unless otherwise noted, the *LeClerc* and *Wallace* plaintiffs.

STANDARD OF REVIEW

We review *de novo* a district court's Rule 12(b)(1) (motion to dismiss for lack of subject matter jurisdiction), Rule 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted), and Rule 56 (motion for summary judgment) dispositions, applying the same standards as

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[16] Sometime after this suit commenced, Maw took and passed the Louisiana Bar exam. Her admission to the Bar is stayed pending the outcome of this case.

the district court. *Bombardier Aerospace v. Ferrer, Poirot & Wansbrough, P.C.*, 354 F.3d 348, 352 (5th Cir. 2003).

DISCUSSION

A. Federal Jurisdiction

The defendants maintain that the plaintiffs lack standing and present unripe claims. They further assert judicial and legislative immunity from the *LeClerc* and *Wallace* suits pursuant to precedent and the Federal Courts Improvement Act of 1996 ("FCIA"), 42 U.S.C. § 1983.[17]

Standing and ripeness are two doctrines of justiciability that assure federal courts will only decide Article III cases or controversies. To achieve standing, a plaintiff must have suffered an injury in fact, *see Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2308, 159 L.Ed.2d 98 (2004), and generally, "must submit to the challenged policy" before pursuing an action to dispute it. *Ellison v. Connor*, 153 F.3d 247, 254-55 (5th Cir. 1998). However, strict adherence to the standing doctrine may be excused when a policy's flat prohibition would render submission futile. *Ellison*, 153 F.3d at 255 (citing *Moore v. United States Dept. of Agric.*, 993 F.3d 1222 (5th Cir. 1993)). The ripeness doctrine counsels against "premature" adjudication by distinguishing matters that are "hypothetical" or "speculative" from those that are poised for judicial review. *United Trans. Union*, 205 F.3d at 857. Even actions for declaratory relief, which by design permit pre-enforcement review, require the presence

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[17] Because federal jurisdiction cannot be waived or assumed, *Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 207 (5th Cir. 1994), we address the defendants' jurisdictional arguments briefly even though they appeared to abandon these jurisdictional contentions at oral argument. *See United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (discussing the Court's obligation to independently examine its jurisdiction despite party concessions).

of an actual "case" or "controversy." *Id.* A pre-enforcement action "is generally ripe if any remaining questions are purely legal . . . [and] further factual development" is not required for effective judicial review. *Id.*

Both the futility exception to the standing doctrine and the pre-enforcement variance to the ripeness doctrine apply here. Strict compliance with the standing doctrine would have required each plaintiff (except Maw) to apply for an equivalency determination under Section 6 of the Louisiana Bar Rules before filing suit. Strict compliance with the ripeness doctrine would have required each plaintiff to file a Section 9 appeal of his or her equivalency denial or rejection prior to filing suit. All but two plaintiffs, Affleck and Wallace, failed to comply with Section 6, and none complied with Section 9.

Nevertheless, given Affleck's equivalency denial after her timely application, Wallace's equivalency revocation, and Section 3(B)'s prohibition against the admission of non-immigrant aliens, as interpreted in *Bourke*, there is no reason to believe that the plaintiffs who failed to submit to Section 3(B) by filing timely Section 6 applications would have experienced different outcomes. The non-conforming plaintiffs' submission would have been a futility for standing purposes.[18] Likewise, the plaintiffs' failure to avail themselves of Section 9 is excused because the aforementioned facts undermine the utility of further factual development, leaving only pure legal questions for adjudication. The plaintiffs thus have standing and have asserted claims that are ripe for adjudication.

Next, rejecting the defendants' immunity defenses, we find that they are amenable to the instant suits. When acting

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[18] Although Maw's current status – having been permitted to take the Louisiana Bar – complicates this issue, the totality of the plaintiffs' experiences weigh in favor of a futility finding.

in its enforcement capacity, the Louisiana Supreme Court, and its members, are not immune from suits for declaratory or injunctive relief. *See Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719, 100 S. Ct. 1967 (1980) (holding that the Virginia Supreme Court and its chief justice may be sued for acts committed in their enforcement capacities). Moreover, the FCIA of 1996 only precludes injunctive relief for suits against a judicial defendant acting in his "judicial capacity."[19] Thus, to the extent that the plaintiffs seek declaratory and injunctive relief against the *enforcement* of Section 3(B) only, the court and its individual members are subject to the instant suits.

B. Merits

Plaintiffs contend that Section 3(B) violates their rights under the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment,[20] and the Supremacy Clause of Art. VI, cl. 2. Each contention will be discussed in turn.

1. Equal Protection

The plaintiffs first advance arguments based on every conceivable level of Equal Protection analysis, contending that: (1) under *In re Griffiths*,[21] nonimmigrant aliens are a

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[19] Title 42 U.S.C. § 1983 provides that:

> [I]n any action brought against a judicial officer for an act or omission taken in such officer's *judicial capacity*, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

(emphasis added) (amended Oct. 19, 1996 by Pub. L. 104-317, Title III § 309(c), 110 Stat. 3853).

[20] Only the *LeClerc* plaintiffs assert a Due Process violation on appeal.

[21] 413 U.S. 717, 93 S. Ct. 2851 (1973).

suspect class and state laws affecting them are subject to strict scrutiny; (2) in the alternative, nonimmigrant aliens are a quasi-suspect class and states laws affecting them are subject to intermediate scrutiny; and (3) in the alternative, if nonimmigrant aliens are not a suspect class at all, state laws affecting them are subject to rational basis review. Plaintiffs maintain that Section 3(B) fails under any of these three tests. Despite some ambiguity in Supreme Court precedent, we conclude that because Section 3(B) affects only nonimmigrant aliens, it is subject to rational basis review.

To begin, nonimmigrant aliens are not a suspect class under *Griffiths*. The plaintiff in *Griffiths* was a permanent resident alien, who, but for a Connecticut law that conditioned bar admission on United States citizenship, would have been eligible to sit for the Connecticut bar exam. 413 U.S. at 718, 93 S. Ct. at 2853. The instant plaintiffs, however, are *nonimmigrant aliens*. The distinction, far from being a "constitutional irrelevancy,"[22] is paramount.[23] Section 3(B) only affects nonimmigrant aliens who are "not entitled to live and work in the United States permanently." *Bourke*, 819 So. 2d at 1022. In contrast, the rule at issue in *Griffiths* effected a "total exclusion [of all] aliens from the practice of law" in Connecticut. *Griffiths*, 413 U.S. at 719, 93 S. Ct. at 2853. It

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[22] *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 469, 105 S. Ct. 3249, 3269 (1985) (stating that "*Plyler*, for example, held that the status of being an undocumented alien is not a 'constitutional irrelevancy,' and therefore declined to review with strict scrutiny classifications affecting undocumented aliens").

[23] *See generally*, David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of *Zadvydas v. Davis*, 2001 Supreme Court Review 47, esp. at 48, 86-87, 92-97, 107 (". . . I believe that the categorical approach still holds up and justifies a major distinction between LPRs [lawful permanent residents] and other aliens for constitutional purposes.").

was this "wholesale ban" of aliens from the Connecticut Bar that the Supreme Court found constitutionally infirm. *Id.* at 725 93 U.S. 2856. Moreover, as elaborated below, the Court took pains to categorize the ways in which resident aliens share essential benefits and burdens of citizenship, *see id.* at 722, 93 S. Ct. at 2855, in a way that aliens with lesser legal status do not.

Thus far, the Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens. As the highest level of Equal Protection analysis, strict scrutiny is employed when a governmental body creates a classification that burdens a fundamental right[24] or targets a suspect class. *Regents of University of California v. Bakke*, 438 U.S. 265, 357, 98 S. Ct. 2733, 2782 (1978). Although classifications based on alienage are inherently suspect and subject to close judicial scrutiny as a general matter, the Court's decisions have "never suggested that such legislation is inherently invalid, nor [has the Court] held that all limitations on aliens are suspect." *See Foley v. Connelie*, 435 U.S. 291, 294, 98 S. Ct. 1067, 1070 (1978) (internal citation omitted).

Beginning in 1971, the Court has applied some variation of strict scrutiny to invalidate state laws affecting "resident aliens" or "permanent resident aliens." *See Graham v. Richardson*, 403 U.S. 365, 371, 91 S. Ct. 1848, 1951 (1971) (applying "strict judicial scrutiny" and striking state laws that denied "resident aliens" disability benefits).[25] The Court has

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[24] The practice of law is not a fundamental right assert able by the plaintiffs, discussed *infra*.

[25] *See also Griffiths, supra* (applying "close judicial scrutiny"); *Exam. Bd. Eng'rs v. De Otero*, 426 U.S. 572, 602, 96 S. Ct. 2264, 2281 (applying "strict judicial scrutiny" and striking a law of Puerto Rico that prevented "resident aliens" from obtaining engineering licenses); *Nyquist v. Mauclet*, 432 U.S. 1, 7, 97 S. Ct. 2120, 2124 (1977) (applying "close judicial scrutiny" and striking

never applied strict scrutiny review to a state law affecting any other alienage classifications, *e.g.*, illegal aliens, the children of illegal aliens, or nonimmigrant aliens. In such cases, the Court has either foregone Equal Protection analysis, *see Toll v. Moreno*, 458 U.S. 1, 102 S. Ct. 2977 (1982) (non immigrant G-4 aliens); *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976) (illegal aliens),[26] or has applied a modified rational basis review, *see Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982) (children of illegal aliens). In the latter case, *Plyler*, the Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens. *See Plyler*, 457 U.S. at 224, 102 S. Ct. at 2398 ("[the Texas law] can hardly be considered rational unless it furthers some *sub-*

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a state law that prevented "permanent resident aliens" from receiving state financial assistance for higher education). These cases, especially *Graham*, follow from the Court's 1948 decision in *Takahashi v. Fish and Game Comm'n*, wherein the Court invalidated, on Supremacy Clause grounds, a California law that prevented resident aliens ineligible for citizenship from obtaining state fishing licenses as inconsistent with Congressional determination to admit such aliens without burden or restriction. 334 U.S. 410, 419, 68 S. Ct. 1138, 1142 (1948).

[26] *Toll* involved a University of Maryland policy that denied in-state tuition fees to domiciled G-4 nonimmigrant aliens and their dependents. The Court invalidated the policy on Supremacy Clause grounds, discussed *infra*, and expressly declined to reach the nonimmigrants' Due Process and Equal Protection claims. *Toll*, 458 U.S. at 9-10, 102 S. Ct. at 2982. In *DeCanas*, the Court reviewed a California law that prohibited the knowing employment of illegal aliens where such would adversely affect resident alien workers. The Court upheld the state law on Supremacy Clause grounds, discussed *infra*. *DeCanas*, 424 U.S. at 354-363, 96 S. Ct. at 936-940. In both *Toll* and *DeCanas*, the Court addressed state laws that not only affected but also drew distinctions among aliens in formulating state policies, yet in neither case did the Court employ Equal Protection analysis.

stantial goal of the State.") (emphasis added).[27] Yet, while adopting a *sui generis* level of rational basis review, the Court acknowledged that the immigration status of the affected class of aliens precluded use of either intermediate or strict scrutiny review.[28]

The development of this jurisprudence is consistent with the Court's fundamental rationale for applying strict scrutiny review exclusively to resident aliens: "[T]he state laws at issue in *Graham*, *Nyquist*, *de Otero*, and *Griffiths* warranted close judicial scrutiny because they took position[s] seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*." *See Foley*, 435 U.S. at 295, 98 S. Ct. at 1070 (emphasis added). The Court has uniformly focused on two conditions particular to resident alien status in justifying strict scrutiny review of state laws affecting resident aliens: (1) the inability of resident aliens to exert political power in their own interest given their status as

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[27] The compromised level of rational basis review is recognized in the concurring opinion of Justice Powell, *id.* at 238, 102 S. Ct. at 2406 (approving the heightened rational basis analysis in the "unique circumstances" of this case), and the dissenting opinion of Justice Burger, *id* at 244, 102 S. Ct. at 2409, (disagreeing that the unfortunate circumstance of illegal alien children entitles them to "special solicitude under the Equal Protection Clause").

[28] In determining that proper level of review to apply in that case, the Court stated:

> Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.

Plyer, 457 U.S. at 223, 102 S. Ct. at 2398. *See id.* at 218, n.16, 102 S. Ct. at 2395, n.16 (discussing but not applying intermediate scrutiny review).

virtual citizens; and (2) the similarity of resident aliens and citizens.

Given the extent to which resident aliens are legally entrenched in American society, their inability to participate in the political process qualifies them as "a prime example of a discrete and insular minority for whom [] heightened judicial solicitude is appropriate." *See Griffiths*, 413 U.S. at 721, 93 S. Ct. at 2854-55 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4, 58 S. Ct. 778, 783-84,n.4 (1938)).[29] Characterizing resident aliens as a *Carolene Products* minority reconciles the breadth of rights and responsibilities they enjoy with their lack of political capacity.[30] Contrary to the plaintiffs' contention, nonimmigrant aliens — who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here — need not be accorded the extraordinary protection of strict scrutiny by virtue of their

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[29] *See also Graham*, 403 U.S. at 373, 91 S. Ct. at 1852; *Griffiths*, 413 U.S. at 721, 93 S. Ct. at 2854-55; *Nyquist*, 432 U.S. at 17, 97 S. Ct. at 2129. *See also Bakke*, 438 U.S. at 290, 98 S. Ct. at 2748 (stating that *Carolene Products* insularity "may be relevant in deciding whether or not to add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination").

[30] In Foley, the Court stated that:

> beginning with a case which involved the denial of welfare assistance essential to life itself, the Court has treated certain restrictions on aliens with "heightened judicial solicitude," *Graham v. Richardson*, 403 U.S. 365, 372 91 S. Ct. 1847, 1852 (1971), a treatment deemed necessary since aliens – pending their eligibility for citizenship – have no direct voice in the political processes. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153, 58 S. Ct. 778, 783-784 (1938).

435 U.S. at 294, 98 S. Ct. at 1070 (citation marks edited).

alien status alone.[31] Nonimmigrant aliens may, of course, qualify for anti-discrimination protection based upon race, sex, national origin and religious adherence, just as they may otherwise enjoy the benefits of American law.[32] But their lack of legal capacity, unlike that of immigrant aliens, is tied to their temporary connection to this country. Moreover, the numerous variations among nonimmigrant aliens' admission status make it inaccurate to describe them *as a class* that is "discrete" or "insular."[33] Nonimmigrant aliens, in short, do not warrant *Carolene Products* status.

The Court's treatment of resident aliens also rests upon pragmatic recognition that resident aliens are similarly situated to citizens in their economic, social and civic (as opposed to political)[34] conditions. In *Griffiths*, the Court observed:

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[31] *Cf.*, Lea Brilmayer, *Carolene, Conflicts and the Fate of the "Inside-Outsider,"* 134 U. Pa. L. Rev. 1291 (1986).

[32] *See e.g.*, 8 U.S. C. § 1324(b) (prohibiting "unfair immigration-related employment practice.").

[33] The Court makes this very point in *Toll*, stating that:

> We noted that as to some categories of nonimmigrant aliens [B, F, and H visa holders], Congress had expressly conditioned admission . . . on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States . . . . With respect to G-4 nonimmigrant aliens, however, we concluded that Congress had deliberately declined to impose restrictions on intent, thereby permitting them to adopt the United States as their domicile.

458 U.S. at 7, n.8, 102 S. Ct. at 2980, n.8 (internal marks and citations omitted).

[34] The Court has expressly declined to extend politically-oriented rights and opportunities to aliens. *See Foley*, 435 U.S. 291, 98 S. Ct. 1067 (applying rational basis review and upholding a state law that conditioned employment as a state trooper on citizenship be-

> Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in a myriad of other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

Griffiths, 413 at 722, 93 S. Ct. at 2855.[35] Like citizens, resident aliens may not be deported, are entitled to reside permanently in the United States,[36] may serve, voluntarily or by

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cause the law implicated rights of governance); *Cabell v. Chavez-Salido*, 454 U.S. 432, 444-47, 102 S. Ct. 735, 742-44 (1982) (applying "lower level scrutiny" and extending *Foley* to uphold a state law conditioning employment as a probation officer on citizenship).

[35] *See also Graham*, 403 U.S. at 376, 91 S. Ct. at 1854 ("Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within the United States for many years, work in the State and contribute to the economic growth of the State. There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of a state"); *Mathews v. Diaz*, 426 U.S. 67, 83, 96 S. Ct. 1883, 1893, 48 L.Ed.2d 478 (1976) ("citizens and those who are most like citizens qualify. Those who are less like citizens do not."); *Nyquist*, 432 U.S. at 12, 97 S. Ct. at 2126-27 ("Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis.").

[36] Title 8 U.S.C. § 1101(a)(20) provides that:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

conscription, in the military,[37] are entitled to state aid benefits,[38] and pay taxes on the same bases as citizens.[39]

Nonimmigrant aliens' status is far more constricted than that of resident aliens. Nonimmigrant aliens are admitted to the United States only for the duration of their status,[40] and on the express condition that they have "no intention of abandoning" their countries of origin and do not intend to seek permanent residence in the United States.[41] They are admitted, remain, and must depart at the discretion of the Attorney General.[42] Plaintiffs acknowledge that nonimmigrant

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[37] Title 10 U.S.C. § 3253 provides that:

> In time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

See also 10 U.S.C. § 8253 (same).

[38] *Graham*, 403 U.S. at 371, 91 S. Ct. at 1851; *Nyquist*, 432 U.S. at 12, 97 S. Ct. at 2127.

[39] Pursuant to the U.S. Tax Guide for Aliens "Resident aliens generally are taxed on their worldwide income, the same as U.S. citizens." IRS Pub. 519, 2003 WL 23305933 (I.R.S.).

[40] 8 C.F.R. § 214.2(f)(5)(I) provides that:

> [d]uration of status is defined as the time during which an F-1 student is pursuing a full course of study at an educational institution . . . .

[41] 8 U.S.C. §§ 1101(a)(15)(F), (H), (J); *Steel* at §3:11, 3-35.

[42] Title 8 U.S.C. § 1227(a)(1)(C) provides that:

> Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if . . . . alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this

aliens may not serve in the U.S. military,[43] are subject to strict employment restrictions,[44] incur differential tax treatment[45] and may be denied federal welfare benefits.[46] Finally,

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title, or to comply with the conditions of any such status, is deportable.

Pursuant to 8 C. F. R. § 241.1(a)(3):

At the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of his or her authorized period of admission or extension of stay, or upon abandonment of his or her authorised nonimmigrant status.

See also 8 U.S.C. § 1184 (explaining the manner in which the Attorney General's discretion pertains to various nonimmigrant alien categories).

[43] 10 U.S.C. § 3253.

[44] *See* 8 C.F.R. § 214.1(e) (nonimmigrant aliens may not engage in productive employment without authorization); 8 C.F.R. § 214.2(f) (prohibiting F-1 visa holders from obtaining gainful employment, not including work-study and internship programs); 8 C.F.R. § 214.2(h) (permitting temporary employment of H-1B nonimmigrants); 8 C.F.R. § 214.2(*l*) (prohibiting L-2 spouses from obtaining employment without prior authorization). The penalty for unauthorized employment is a determination of "failure to maintain status." 8 C.F.R. § 214.1(e). The gainful employment ban may also be excepted in other cases of financial hardship. *Steel*, at 3-40-42.

[45] Pursuant to the U.S. Tax Guide for Aliens, as compared to resident aliens and citizens, "Nonresident aliens are tax only on their income from sources within the United States and on certain income connected with the conduct of a trade or business in the United States." IRS PUB. 519, 2003 WL 23305933 (I.R.S.).

[46] *Mathews*, 426 U.S. at 83, 96 S.Ct. at 1893. *See also* 26 U.S.C. § 3306(c) (8) (amended by the AMERICAN JOBS CREATION ACT OF 2004, PL 108-357, October 22, 2004, 118 STAT 1418 and the RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION ACT

the Supreme Court has yet expressly to bestow equal protection status on nonimmigrant aliens.[47]

Based on the aggregate factual and legal distinctions between resident aliens and nonimmigrant aliens, we conclude that although aliens are a suspect class in general, they are not homogeneous and precedent does not support the proposition that nonimmigrant aliens are a suspect class entitled to have state legislative classifications concerning them subjected to strict scrutiny. We declined to extend the Supreme Court's decisions concerning resident aliens to different alien categories when the Court itself has shied away from such expansion. We thus turn to the plaintiffs' alternative Equal Protection arguments.

Contrary to plaintiffs' contention, there is no precedential basis for the proposition that nonimmigrant aliens are a quasi-suspect class or that state laws affecting them are subject to intermediate scrutiny. The decision in *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264 (1996), which reinforced caselaw that treats *gender* as a "quasi-suspect classification," furnishes no authority for the application of intermediate Equal Protection analysis to alienage classifications. *Virginia*, 518 U.S. at 532-33, 116 S. Ct. at 2275. Again, we decline to move where the Supreme Court has not gone.

By process of elimination, rational basis review must be the appropriate standard for evaluating state law classifications affecting nonimmigrant aliens. Here, caselaw has distinguished between traditional rational basis review and

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FOR FISCAL YEAR 2005, PL 108-375, October 28, 2004, 118 STAT 1811).

[47] *Toll*, 458 U.S. at 9-10, 102 S. Ct. at 2982 (refusing to reach equal protection argument). *Plyler* is not to the contrary, as it involved the special class of alien children, who were not responsible for their immigration status, and the provision of education.

heightened rational basis review. But, the latter standard appears solely in *Plyler*, which, as noted, is a far different case from the case at bar. There, after declaring that undocumented aliens are not a suspect class[48] and that education is not a fundamental right, *see id.*, 457 U.S. at 223, 102 S. Ct. at 2398, the Court found the children of illegal aliens, having no culpability for or control over their condition, are worthy of "special judicial solicitude" in the form of heightened rational basis review. *Id.* Thus, the Court elevated the rational basis tests and inquired whether the Texas law "furthered some *substantial* goal of the state." *Id.* at 224, 102 S. Ct. at 2398 (emphasis added). Had the Court not modified rational basis review in *Plyler*, the Texas law would have survived. As articulated by the Court, traditional rational basis analysis provides that:

> The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that *roughly approximate the nature of the problem perceived*, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears ***some fair*** relationship to a legitimate public purpose.

Id. 457 U.S. at 216, 102 S. Ct. at 2394 (emphasis added). Under the traditional test, Texas's legitimate interests — conservation of budget resources and deterrence of illegal immi-

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[48] Under the plaintiffs' rationale – that lack of political capacity alone should render an alien group worthy of heightened judicial solicitude and strict scrutiny review – undocumented aliens would be the most insular and deserving of *Carolene Products* minority status. Yet, the Court specifically denied them suspect status.

gration — probably would have been sufficient to justify the state's decision to deny state benefits to illegal entrants and their children. But in this unique instance, the Court was moved by the consequences and unfairness of enforcing such a regulation against children. *Id.* at 220, 102 S. Ct. at 2396.[49]

These plaintiffs who would be Louisiana lawyers find no support in *Plyler*. As nonimmigrant aliens, they entered this country voluntarily and with an understanding of their limited, temporary status. They face no hurdle as debilitating as denial of primary and secondary education. That, under Section 3(B), they are denied the ability to engage in a specific type of legal work — that requiring a license — is simply not analogous to the plight of illegal alien children. Nothing in *Plyler* compels the determination that nonimmigrant alien law students and temporary workers are similarly situated to the children of illegal aliens, and, thus, entitled to similar heightened rational basis review.

Under traditional rational basis analysis, a state law classification that "neither burdens a fundamental right nor targets a suspect class" will be upheld "so long as it bears a rational relation to *some* legitimate end." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S. Ct. 2293, 2297 (1997) (emphasis added). The key principle is the deference to legislative policy decisions embodied in courts' reluctance to judge the wisdom, fairness, logic or desirability of those choices. Viewed through this deferential lens, Section 3(B)'s classification bears a rational relationship to legitimate state interests — Louisiana' substantial interest in regulating the practice of those it admits to its bar. Section 3(B) aims to assure clients that attorneys licensed by the Louisiana Bar will provide continuity and accountability in legal representation. The Bar's

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[49] The Court's invalidation of the Texas law further rested upon a determination that the state's action was not in accord with congressional policy. *Id.* at 224-25, 102 S. Ct. at 2399.

ability to monitor, regulate, and, when necessary, discipline and sanction members of the Bar requires that it be able to locate lawyers under its jurisdiction. The State's determination that the easily terminable status of nonimmigrant aliens would impair these interests and their enforcement capacity is not irrational.

The plaintiffs argue that in focusing on the alleged transience of nonimmigrant aliens, Section 3(B) irrationally fails to deal with other causes of lawyer nonfeasance. While it is true that any attorney, regardless of citizenship status, could fall ill, become unavailable to clients, or leave the jurisdiction (and many actually do leave), such concerns are distinct from the special quandary arising from the federally prescribed transience of nonimmigrant aliens. The problem perceived by the defendants is that if a nonimmigrant practitioner leaves the country (voluntarily or by compulsion) to the detriment of Louisiana clients, such an attorney would be utterly beyond the reach of the Louisiana Bar. Contrary to the plaintiffs' contentions, the international transience of nonimmigrant alien practitioners is not analogous to that of a citizen or immigrant alien practitioner who leaves Louisiana. State reciprocity and interstate bar agreements would allow the Louisiana Bar to pursue an attorney who relocates domestically, but there is no doctrine of international reciprocity enabling the Louisiana Bar to reach a malfeasant or nonfeasant nonimmigrant attorney who has fled the United States. Even if the Bar tracked down such an attorney in a foreign country, because nonimmigrants (in contrast to citizens and immigrant aliens) may not establish domicile in the United States and will usually have limited assets here, Louisiana courts would have questionable ability to exercise jurisdiction over such a person. The state would be impotent to remedy unethical or incompetent conduct, and a Louisiana client's ability to seek redress would be frustrated. Section 3(B) is underinclusive with respect to all possible foreseeable types of attorney abandonment, but it is not irrationally un-

derinclusive with respect to this particularly troublesome situation.[50]

In these ways, Section 3(B), which limits Bar admission to persons able to live and work permanently in the United States, is rationally related to the state's interest in assuring continuity and accountability in legal representation. Section 3(B) does not make the mistake, remedied in *Griffiths*, of denigrating aliens in general. Instead, Section 3(B) recognizes that the inherent terms and conditions of nonimmigrant status all but assure a lack of continuity and impairment of the Bar's ability to carry out its regulatory and police functions. As such, Section 3(B) is a proper exercise of Louisiana's police powers in pursuit of these interests.

Plaintiffs also complain that Section 3(B) is irrationally overinclusive because it assumes that nonimmigrant alien practitioners will be transient, when in fact they are just as likely, having gone to the trouble to be admitted to the Louisiana Bar, to extend their stays in this country. The plaintiffs' argument is plausible, but no more so than the state's contrary hypothesis. Moreover, unlike American citizens who seek admission to the bar in a state where they do not reside, the nature of nonimmigrant transience is substantially different — nonimmigrant aliens cannot unilaterally change their transient or noncitizen status.

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[50] In concluding that the Bar Committee in *Griffiths* failed to establish the necessity of excluding "all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards[,]" the Court noted that "once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts . . . . the range of postadmission sanctions extends from judgments for contempt to criminal prosecutions and disbarment." 413 U.S. at 727, 93 S. Ct. at 2857-58. The Louisiana Bar's concern that the temporary status of student and H-1B temporary worker visa holders might frustrate its ability to carry out these functions is legitimate.

The plaintiffs also generally criticize Section 3(B) as overbroad (*e.g.*, because H-1B nonimmigrants must be sponsored by an employer, who in a case of malfeasance, may be ethically responsible for the attorney's misdeeds) and imprecise in achieving its desired ends. Even if it is flawed, the provision cannot be legitimately characterized as arbitrary or irrational. A court's inquiry is not for legislative precision, acuity, or acumen. *See Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 1627 (1996) (stating that "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous"). Section 3(B) may be undesirable in an increasingly globalized commercial climate, but our perception of the wisdom of the measure fails to render it constitutionally infirm under traditional rational basis review. Section 3(B) need only be rationally related to *some* legitimate end. *Romer*, 517 U.S. at 632, 116 S. Ct. at 1627. Section 3(B) is, at the least, "roughly approximate" to the concerns identified by Louisiana, given "limitations on the practical ability of the state to remedy every ill." *Plyler*, 457 U.S. at 216, 102 S. Ct. at 2394.

Because Section 3(B) serves a legitimate end, and there is no basis for applying a heightened level of scrutiny, it survives rational basis review.

2. Due Process

The *LeClerc* plaintiffs assert procedural due process challenges to Section 3(B). As aliens, they are "'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210, 102 S. Ct. at 2391 (citations omitted).[51] Procedural due process entitles a person to a hearing before being deprived of an interest pro-

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[51] The Privileges and Immunities Clause protects only citizens. *Compare Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607 (1987).

tected by the Fourteenth Amendment. *Bd. of Regents v. Roth*, 408 U.S. 564, 570, 92 S. Ct. 2701, 2705 (1972). As relevant here, "the existence of . . . eligibility rules" gives a party seeking admission to practice his chosen profession "an interest and claim to practice . . . to which procedural due process requirements appl[y]." *Roth*, 408 U.S. at 577, n.15, 92 S. Ct. at 2709, n.15 (internal citation omitted). However, procedural due process rights do not vest in a party who has failed to seek a hearing before filing suit. *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123, 46 S. Ct. 215, 218 (1926); *See also Myrick v. City of Dallas*, 810 F.2d 1382, 1388 (5th Cir. 1987) (holding that a complainant "cannot skip an available state remedy and then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy"). Although Louisiana's Bar admission rules gave the plaintiffs an interest to which procedural due process rights attached, the plaintiffs cannot state a claim for a procedural due process violation because they opted not to appeal under Section 9.

3. Supremacy Clause and Preemption

The plaintiffs maintain that Section 3(B) is preempted by the comprehensive statutory scheme embodied in the Immigration and Nationality Act ("INA") and conflicts with some of its specific provisions.[52] Despite the federal government's primacy over the regulation of immigration, not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted . . . ." *DeCanas*, 424 U.S. at 355, 96 S. Ct. at 936. The Constitution, by committing regulation of immigration to the federal govern-

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[52] The *LeClerc* plaintiffs further contend that NAFTA and GATS, which they argue are intended to liberalize United States licensing and certification requirements, evince congressional intent to preempt restrictive state licensing schemes. The *LeClerc* plaintiffs' arguments concerning NAFTA and GATS are, respectively, inapposite and unpreserved.

ment, did not deprive the states of all power to legislate regarding aliens.[53] *Id.* Nevertheless, ostensibly harmonious state regulation may run afoul of the Supremacy Clause if it, in effect, interferes with the goals of federal policy. *Id.* Yet, even in this context, "[f]ederal regulation . . . should not be deemed preemptive in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Id.* at 356, 96 S. Ct. at 937 (internal citation omitted).

Section 3(B) is unquestionably a permissible exercise of Louisiana's broad police powers to regulate employment within its jurisdiction for the protection of its residents. *See id.* at 356, 96 S. Ct. at 937 (explaining that a state has "broad . . . policy powers" to regulate employment within its borders. The Louisiana Supreme Court was rationally entitled to conclude that the temporary status of nonimmigrant aliens could impede the Bar's regulatory and disciplinary efforts.[54] Conditions that frustrate the administration of Louisiana's licensing scheme are "certainly within the mainstream of such police power regulation." *Id.* at 356-57, 96 S. Ct. at 937.

Further, as a state regulation dealing with the employment of nonimmigrant aliens, Section 3(B) is not facially preempted by the INA. The Supreme Court has acknowl-

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[53] See *Plyler*, 457 U.S. at 229, n.19, 102 S. Ct. at 2396, n.19 ("If the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction") (citing *DeCanas*, 424 U.S. 351, 96 S. Ct. 933).

[54] Contrary to the plaintiffs' contentions, the status of bar admission rules in other states is neither controlling nor persuasive. A situation discerned as problematic by the state need not be viewed as pervasive or universal in order to justify the state's attempt to address it.

edged that "there is no indication that Congress intended to preclude state law in the area of [alien] employment regulation." *Id.* at 358, 362, 96 S. Ct. at 937-38, 940. Thus, the field of alien employment tolerates harmonious state regulation.

The fact that Section 3(B) denies Bar admission to some aliens and not to others conflicts neither with the INA nor with the Supreme Court's disposition in *Toll*. In *Toll*, the Court invalidated a University of Maryland policy denying in-state tuition status to G-4 nonimmigrant aliens — who are permitted by congressional directive to establish domicile in the United States — as inconsistent with federal policy that prevented these student aliens from establishing state domicile. *Toll*, 458 U.S. at 11, 102 S. Ct. at 2983. *Toll* held that, "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." However, the Court added a caveat:

> To be sure, when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute.

Toll 458 U.S. at 12-13, 102 S. Ct. at 2983 (quoting, in part, *DeCanas*, 424 U.S. at 358, n.6, 96 S. Ct. at 938, n.6). The substantive holding in *Toll* is distinguishable from the instant case for two reasons. First, Section 3(B) raises the situation contemplated, but not addressed, in *Toll* — the validity of state laws affecting *transient* nonimmigrant aliens. Second, there is no incongruity between what Congress permits of student and temporary worker nonimmigrants and what Section 3(B) prevents.

First, as with the alien class in general, the sub-class of nonimmigrant aliens is itself heterogeneous, and the distinctions among them are relevant for preemption purposes. *Toll* specifically distinguished between G-4 nonimmigrant aliens

— upon whom Congress expressly declined to impose domicile restrictions — and the F-1 student and H-1B temporary worker nonimmigrant aliens at issue in this case — upon whom Congress has clearly imposed domicile restrictions.[55] Section 3(B) affects only the latter group.

Second, Section 3(B) does not succumb to the *Toll* infirmity of proscribing by state law what Congress expressly permits by federal statute. Section 3(B) does not prevent the legal matriculation of nonimmigrant alien students admitted to the United States on F-1 or J-1 visas. Section 3(B) is, in fact, consistent with provisions that prohibit student visa holders from obtaining gainful employment, require them to obtain specific authorization for certain types of matriculation-related employment, *e.g.*, internships and work-study programs, requires their departure at the expiration of their

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[55] As the Court stated in *Toll*:

> [T]he nonimmigrant classification is by no means homogenous .... For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States .... [A] nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning ... and who seeks to enter the United States temporarily and solely for ... study ...." § 101(a)(15)(F). *See also* ... § 101(a)(15)(H) (temporary worker having residence in foreign country "which he has no intention of abandoning") .... *But Congress did not restrict every nonimmigrant class.* In particular, no restrictions on a nonimmigrant's intent were placed on [G-4] aliens ... [T]his was deliberate ... confirmed by the regulations ... which provide that G-4 aliens are admitted for an indefinite period ....

Elkins v. Moreno, 435 U.S. 647, 665, 98 S. Ct. 1338, 1349 (emphasis added). See also *Toll*, 458 U.S. at 7, n.8, 102 S. Ct. at 2980, n. 8 (citing *Elkins*, 435 at 665, 98 S. Ct. at 1349 and 8 U.S.C. §§ 1101(a)(15)(B), (F), (H)).

status, and prohibits them from establishing domicile in the United States.

Nor does Section 3(B), contrary to plaintiffs' contentions, prevent them from complying with H-1B nonimmigrant visa requirements. H-1B status requires the nonimmigrant applicant to qualify for a temporary worker visa by presenting documentation of: a state professional license; a bachelor's, or higher, degree in the profession; an equivalent foreign degree; *or* equivalent foreign experience. 8 C.F.R. § 214.2(h). H-1B's four compliance measures are disjunctive; its professional licensing option is permissive, not mandatory. While Section 3(B) permits one of these alternatives, it does not prevent an H-1B visa holder who satisfies at least one of the other compliance methods from obtaining employment within the broad field encompassed by the practice of law. Moreover, Section 3(B) is consistent with an H-1B visa provision that contemplates non-licensed employment.[36] As demonstrated, Section 3(B) is in accord, rather than conflict, with federal regulation of alien employment.

The plaintiffs finally argue that the INA impliedly preempts Section 3(B) because it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *DeCanas*, 424 U.S. at 363, 96 S. Ct. at 940. We disagree. As the Court made clear in *DeCanas*, the intersection of state and federal law does not necessarily re-

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[36] 8 C.F.R. § 214.2(h) provides that:

> Duties without licensure. In certain occupations which generally require licensure, a statute may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

quire or effect preemption. Upholding a California law criminalizing the employment of illegal aliens, *DeCanas* held that the overlap of state and federal law did not equate to "withdrawal from the States of power to regulate where the activity regulated was a mere peripheral concern" to the federal law. *Id.* at 361, 96 S. Ct. at 939. Similarly, while Section 3(B) prohibits Bar admission of nonimmigrant aliens even though the INA permits H-1B visa holders to seek professional licensing, the provision is "peripheral" to intersecting federal law which does not itself mandate domestic professional licensing.

Section 3(B) is a state Bar rule designed to address local problems arising from the transitory status of nonimmigrant aliens who, by the terms and conditions of their federal status, possess fewer ties to the United States than any other group (besides illegal aliens). Section 3(B) attempts to protect Louisiana residents seeking legal representation and affects a class of persons whom Congress has expressly prohibited from living or working permanently in the United States. *See id.* at 363, 96 S. Ct. at 940 (explaining that although federal law predominates in the field of immigration, there is minimal federal interest in state laws crafted to address local problems and affecting local entities in a manner consistent with federal declarations). Rather than standing as an obstacle to federal law, Section 3(B) is consistent with the federal policy embodied in the INA.

CONCLUSION

For the reasons stated herein, the judgment in *LeClerc v. Webb*, 270 F. Supp. 2d 779 (E.D. La. 2003) is AFFIRMED. The judgment in *Wallace, et al v. Calogero, et al.*, 286 F. Supp. 2d 748 (E.D. La. 2003) is REVERSED.

CARL E. STEWART, Circuit Judge, concurring in part and dissenting in part:

I concur in the panel's majority decision affirming the district courts' rulings that : (1) Section 3(B) is not preempted by federal immigration or trade policy; (2) the defendants' jurisdiction arguments should be denied; (3) the plaintiffs' due process arguments should be dismissed, (4) plaintiff Affleck lacked standing to assert a claim under the NAFTA, and (5) the *LeClerc* plaintiffs' motion to reconsider should be denied. For the following reasons, I respectfully dissent from the majority's conclusion that the plaintiffs' Equal Protection claim should be dismissed.

First, I disagree with the majority's conclusion that strict scrutiny review should not apply to the issue before us. The Supreme Court in *Graham v. Richardson* held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." 403 U.S. 365, 372 (1971) (internal citation omitted); *see also Applications of Griffiths*, 413 U.S. 717, 721 (1973). It should be noted that not all limitations on aliens are suspect. *See Foley v. Connelie*, 435 U.S. 291, 294 (1978). Although the general rule is that classifications of aliens are suspect and strict scrutiny should apply, the Court has also held that less than strict scrutiny is warranted where a state law discriminates based on alienage classification regarding matters related to the democratic process. *Id.* ("a democratic society can be ruled by its own people"). Also, because Congress has plenary power to regulate immigration, federal statutes and presidential orders that discriminate against aliens are also reviewed with something less than strict scrutiny. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("the relationship between the U.S. and our alien visitors has been committed to the political branches of the federal government. Since decisions in these matters may implicate our

relations with foreign powers . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive branches than to the Judiciary."). In all other circumstances, the Supreme Court has applied strict scrutiny to classifications based on alienage. Alienage is defined as the state or condition of being an alien. BLACK'S LAW DICTIONARY 79 (8th ed. 1999). An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The majority is wary about "expanding" strict scrutiny review to nonimmigrant aliens as a distinctive suspect class in the absence of a black letter holding by the U.S. Supreme Court to that effect. I disagree with the majority's reservations because the Supreme Court's statement that "alienage is a suspect class" by definition includes nonimmigrant aliens as part of that class.

The majority emphasizes that, as opposed to the Rule at issue here, "the rule at issue in *Griffiths* effected a 'total exclusion [of all] aliens from the practice of law' in Connecticut." Proposed Op. at 415. However, the Supreme Court has stated that "[t]he fact that the [challenged] statute is not an absolute bar [against all aliens] does not mean that it does not discriminate against the class." *Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977). It is only important that the Rule is directed at aliens and only aliens are harmed by it. *Id.* Section 3(B) only allows citizens and resident aliens to apply for admission to the Louisiana state bar. *In re Bourke*, 819 So.2d 1020, 1021 (La. 2002). Because the Louisiana Supreme Court has defined resident aliens as "aliens who have been granted permanent resident status in the United States," *id.*, the Rule discriminates against all nonimmigrant aliens. The Rule does discriminate against the class because it is directed at aliens and only aliens are harmed by it.

In discussing the alien suspect class, the Supreme Court has referred to resident aliens, aliens and non-citizens interchangeably. The majority uses the term resident aliens in referring to the suspect class first created in *Graham v.*

Richardson. In order to properly understand the semantics in this case, it is necessary to explore the definitions used in the Immigration and Nationality Act (INA), 8 U.S.C. § 1101, *et seq*. All aliens legally admitted in the U.S. fall into one of two categories: immigrant (persons who want to become permanent residents) and non-immigrant (persons granted stay for a limited period of time). DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURES § 5-1 – 6-1 (4th ed. 1998). These two broad categories are each further divided into specific types of visas. *Id.* In INA, there is no definition of resident alien, only a definition of residence as referring "only to the place of general abode without regard to intention."[1] See 8 U.S.C. § 1101(a)(33). Thus, residence and immigration status should be understood as two separate distinctions; one does not necessarily have to do with the other. As the district court noted in *Wallace v. Calogero*, "the term 'resident alien' is broader than the Act's immigration categories and includes both immigrant and nonimmigrant aliens lawfully residing in the United States." 286 F. Supp. 2d 748, 762 (E.D. La. 2003). In other words, a nonimmigrant alien who lives in the United States is but one class of resident alien. I read the term "resident alien," as it is used I the Supreme Court's jurisprudence, as simply indicating that the

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[1] Resident alien is essentially a tax distinction. *See* 26 U.S.C. § 7701(b). There are primarily two ways to determine whether one is a resident alien for tax purposes. The first is the green card test, if you have a green card, and therefore are a permanent resident, you are a resident under tax law. *Id.* at § 7701(b)(1)(A)(i). The other is the substantial presence test. Under the substantial presence test you will be considered a U.S. resident if you were physically present in the U.S. for at least 31 calendar days during the course of the year and 183 days during the 3 year period that includes the current year and two previous years immediately before it. *Id.* at § 7701(b)(3). Considering H-1B visa holders, for example, can stay in the country for up to 6 years, it is possible for an alien to be both a non-immigrant and pay taxes as a resident alien.

alien resides in the United States. This point is further made clear by Justice Blackmun's majority opinion in *Kleindienst v.Mandel*, 408 U.S. 753 (1972). Justice Blackmun, the author of the majority opinion in *Graham*, used the term "nonresident alien" to refer to plaintiff Ernst Mandel, a Belgian citizen who resided in Brussels. 408 U.S. at 762.

The Court has not distinguished between immigrant aliens or nonimmigrants when discussing the alienage suspect class even though the Court has had before it cases which involved extensive review of the Immigration and Naturalization Act and its various classifications for admitted aliens; the Court was not ignorant of the terminology associated with the INA's alien classifications nor presumably of the distinctions between these classifications. *See e.g., Kleindienst*, 408 U.S. at 753, 757 n.4 (holding that a Belgian citizen living in Brussels, "as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise"); *see also Saxbe v. Bustos*, 419 U.S. 65 (1974) (holding that daily and seasonal alien commuters qualify as immigrant aliens rather than as nonimmigrant aliens). Despite the Court's familiarity with the distinction between immigrant and nonimmigrant aliens, the Court has still spoken of a general "alien" suspect class.

The defendants and the majority rely heavily on the fact that the Court's cases that employ strict scrutiny analysis all involved plaintiffs who were permanent resident aliens.[2] However, I am not persuaded that based on this fact alone, the Court's strict scrutiny analysis should be restricted to laws that discriminate against permanent resident aliens. Again, the Supreme Court has not explicitly emphasized the alien plaintiffs' permanent resident status in discussing the

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[2] It should be noted that in some of the Supreme Court's opinions, the exact nature of the plaintiff's immigration status is unclear or not discussed. *See e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

alien suspect class. As the majority opinion observes, nonimmigrant aliens have come before the Court asserting Equal Protection claims. Twice the Court found it unnecessary to reach the Equal Protection issue, *see Toll v. Moreno*, 458 U.S. 1 (1982), and *De Canas v. Bica*, 424 U.S. 351 (1976), and once the Court applied rational basis review, see *Plyler v. Doe*, 457 U.S. 202 (1982). Although the Court applied rational basis review to the aliens in *Plyler*, as the majority notes, *Plyler* "is a far different case from the case at bar." Proposed Op. at 420. *Plyler* involved illegal aliens. In refusing to grant suspect classification to illegal aliens, the Court focused on their undocumented and unlawful status. *Plyler*, 457 U.S. at 219 n.19. The nonimmigrant aliens here, by contrast, are lawfully admitted aliens. The Court's opinions have applied strict scrutiny review when the plaintiffs at issue are lawfully admitted aliens who reside in the United States, like the plaintiffs here. *See e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *Graham*, 403 U.S. at 371.

The majority also relies heavily on the Supreme Court's statement in *Griffiths* that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722. Nonimmigrant aliens do pay taxes, support the economy and contribute in other ways to our society. *See* n.1, *supra*. Nonetheless, I am not persuaded that an alien's ability to serve in the Armed Forces or pay taxes is the primary rationale for affording suspect class designation to aliens; after all aliens were afforded suspect class designation before *Griffiths*. *See Graham*, 403 U.S. 365. Instead, the basis for aliens' class designation seems to be premised on aliens' inability to vote, and thus their impotence in the political process, and the long history of invidious discrimination against them. *See Plyler*, 457 U.S. at 218 n.14 (citing *Graham*, 403

U.S. at 372); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 618-19 (1997). *See generally Takahashi*, 334 U.S. 410.

In order to distance nonimmigrant aliens from the class of "aliens" that the Supreme Court has recognized as inherently suspect, the majority emphasizes the temporary and "transient" status of nonimmigrant aliens. However, the majority is unable to avoid the Supreme Court's ruling in *Toll v. Moreno*, which recognized that nonimmigrant aliens who hold a G-4 visa are aliens with permanent status similar to citizens and immigrant aliens. 458 U.S. 1 (1983); *see also Elkins v. Moreno*, 435 U.S. 647, 663-64 (1978). The majority vigorously asserts that G-4 nonimmigrant aliens are distinct from the nonimmigrant aliens here because the aliens here are "transient nonimmigrant aliens," a new alienage classification crafted by the majority's opinion only. However, the constitutional challenge here is not an as applied challenge to Section 3(B). The plaintiffs assert that the rule discriminates against all nonimmigrant aliens. Therefore, if one nonimmigrant alien group does not fit within the opinion's analysis — that nonimmigrant aliens are not a suspect class because they are not "permanent" residents — then the majority's argument as a whole must fail.

The majority states that "nonimmigrant aliens — who ordinarily stipulated before entry to this country that they have no intention of abandoning their citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here — need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone." Proposed Op. at 417. But, not all nonimmigrant aliens are required to keep a permanent residence abroad and are not allowed to intend to stay in the United States. Besides, G-4 nonimmigrant aliens, the Immigration Act of 1990 states that H-1 and L category visa holders (as some of the plaintiffs are here) do not have to pledge an intention to only stay in the United States temporarily, and can seek permanent

residence in the United States. 22 C.F.R. § 41.11; 8 C.F.R. §§ 214.2(h)(16), (1) (16); 68 No. 21 Interpreter Releases 681-84 (June 3, 1991). The BIA and the State Department also recognize the doctrine of dual intent, which allows nonimmigrant aliens who are required to keep a permanent residence in their foreign country to both express a short term intent to remain in the United States temporarily (so as to not contravene the requirements of the visa under which they entered) and a long term intent to remain in the United States permanently (so that they may apply for adjustment of status). *Matter of Hosseinpour*, 15 I&N Dec. 191, 192 (BIA 1975); 70 No. 42 Interpreter Releases 1444, 1456-58 (No. 1, 1993).

I read the Supreme Court's jurisprudence to provide that nonimmigrant aliens, as persons who are not citizens nor nationals of this country, are part of the alien suspect class and therefore, laws that discriminate against them are inherently suspect and should be subjected to strict scrutiny review. Because of the Court's opinions, the presumption should be that nonimmigrant aliens are part of the alien suspect class and the defendants should have the burden of proving the opposite. I am not persuaded by the arguments put forth by the defendants that the Supreme Court did not intend to include nonimmigrant aliens as part of the alienage suspect classification.

Nevertheless, even assuming *arguendo* that rational basis is the appropriate analysis to be used in this case, I disagree with the majority's holding that the Louisiana rule survives rational basis review. To pass rational basis review, the defendants must show that nonimmigrant aliens pose some special threat to the State's legitimate interests, in a way that other permitted bar applicants, citizens or immigrant aliens, do not. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) ("it is true that the mentally retarded as a group are indeed different . . . [b]ut this difference is largely irrelevant unless the [group home] and those who would occupy it would threaten legitimate interests of the

city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below").

The majority opinion's discussion of the equal protection claim is most problematic at this point because it is in essence trying to "push a square peg into a round hole." The defendants assert that nonimmigrant aliens pose a special threat to the integrity of the Louisiana bar because they could be unexpectedly deported or they could leave and go back to their home country, leaving litigants in the lurch. The defendants assert that unlike citizens and immigrant aliens, nonimmigrant aliens are more susceptible to being "international transients." The Louisiana Supreme Court would be unable to reach malfeasant attorneys because the Louisiana bar does not have reciprocity with other nations and because nonimmigrant aliens are not able to establish domicile and, therefore, the state courts could not assert jurisdiction.

However true that may be, these concerns apply equally to both citizens and immigrant aliens. Citizens have a constitutional right to travel. *Califano v. Gautier Torres*, 435 U.S. 1 (1978). Although the Louisiana state bar may have reciprocity with other states, citizens could leave the country and establish residency abroad, and as the majority states, Louisiana does not have reciprocity with other nations. Likewise, immigrant aliens may travel abroad and not return, leaving clients behind. Moreover, both nonimmigrant aliens and immigrant aliens are subject to deportation; only citizens may not be deported. The majority asserts that nonimmigrant aliens pose a special threat to Louisiana clients because nonimmigrant aliens may not establish domicile or have assets in Louisiana and, therefore, the courts may be precluded from asserting jurisdiction over nonimmigrant attorneys should the need to reach them arise. But the Louisiana bar has no requirement that bar applicants, or bar members, be Louisiana

residents or spend any time in Louisiana or in any way have a connection with the state. Therefore, Louisiana courts may also be unable to assert jurisdiction over members of the Louisiana bar who are citizens or immigrant aliens. Moreover, it may be possible for nonimmigrant aliens to be domiciled in Louisiana — as the Supreme Court found that the nonimmigrant alien plaintiffs were in *Toll*. *See* 458 U.S. at 17. As the district court in *Wallace* averred:

> The Rule does not restrict membership to the bar to citizens and immigrant aliens who plan to reside permanently in Louisiana. Nonimmigrant aliens as a class are not necessarily more transient than other groups. Citizens and immigrant aliens may be admitted to the bar even if they have no intention of residing in Louisiana. Louisiana attorneys relocate to other states and maintain bar membership in states where they do not reside. Due to advances in technology, attorneys can provide services and representation to clients from virtually anywhere. Louisiana attorneys retire, die, and leave the practice for a myriad of reasons. If the Louisiana Supreme Court were concerned with transience, the Rule would be calculated to address that problem directly. However, the Rule only excludes a fraction of persons who may have temporary residence in the state. The fact that the Plaintiffs must leave on a date certain does not change the analysis. On the contrary, it might be an advantage. Plaintiffs will be able to plan in advance for their departure and make the necessary arrangements to protect the interests of their clients.

Wallace, 286 F. Supp. 2d at 763.

In my view, the Louisiana rule does not pass constitutional muster under even the exceedingly permissive rational basis standard of review. The Rule at issue is purported to be

a prophylactic remedy to insulate potential clients from lawyers who are forced to leave the country unexpectedly, or who leave the country voluntarily, without an available means for the state courts to assert jurisdiction to reach the malfeasant attorneys. However, if the purpose of the Rule is to protect court dockets from disruption and protect the state's citizens from lawyers who may leave suddenly, the Rule is not the least restrictive way to do it nor, as the district court in *Wallace* noted, is the Rule in fact calculated to achieve this purpose.

For the foregoing reasons, I respectfully dissent from the majority's dismissal of the plaintiffs' Equal Protection claim and the reversal of the district court's judgment in *Wallace v. Calogero*.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Karen Leclerc, et al.

v.

Daniel A. Webb, et al.

Docket No. Civ. A. 03-664

July 2, 2003

ORDER AND REASONS

ZAINEY, District Judge.

Before the Court are Defendants' Motion to Dismiss filed by Justices Jeffrey P. Victory, Jeannette Theriot Knoll, Chet D. Traylor, Catherine D. "Kitty" Kimball, John L. Weimer, Bernette Joshua Johnson, in their official capacities as Justices as of the Supreme Court of Louisiana and Daniel A. Webb and Harry J. Phillips, Jr., in their official capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions, Plaintiffs' Appeal of the Order of the Magistrate Judge Granting a Protective Order and Staying All Discovery and Plaintiffs' Motion for Summary Judgment filed by Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck.

Plaintiffs are non-immigrant aliens[1] residing in the United States pursuant to temporary visas. Plaintiffs have brought this suit challenging Louisiana Supreme Court Rule

[1] The terms non-resident alien and non-immigrant alien are used interchangeably throughout this opinion. Likewise, the terms resident alien and immigrant alien are also used interchangeably.

XVII, Section 3(B) which requires that every applicant to the Louisiana bar be a citizen or resident alien of the United States. They allege that Rule XVII, as currently interpreted by the Louisiana Supreme Court, is unconstitutional and/or preempted by federal law. Plaintiffs seek declaratory and injunctive relief as well as an award of costs and attorney's fees. Defendants have moved to dismiss all claims arguing *inter alia* that the suit is barred by the Eleventh Amendment as well as the doctrine of judicial and legislative immunity. Defendants also argue that Plaintiffs fail to state a claim for relief under federal law.

I. Factual Background

Plaintiffs currently reside in the United States under temporary visas which provide a date certain when they must leave the United States. Leclerc, Jarry and Boulord are French citizens admitted to the United States pursuant to J-1 visas. Affleck is a Canadian citizen admitted to the United States pursuant to an L-2 visa. All plaintiffs are graduates of foreign law schools. Plaintiffs desire to submit applications to sit for the July 2003 bar examination and believe themselves to be qualified but for their status as non-resident aliens.[2]

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[2] Supreme Court Rule XVII Section 3(B) requires that every applicant for admission to the Louisiana Bar "[b]e a citizen of the United States or a *resident alien* thereof." La. S.Ct. R. XVII, § 3(B) (emphasis added). The Louisiana Supreme Court had previously interpreted the term "resident alien" to include foreign nationals lawfully living within the United States. *See, e.g., In re Appert*, 444 So.2d 1208 (La. 1984), *overruled by In re Bourke*, 819 So.2d 1020 (La. 2002). However, in 2002, the court held that the term "resident alien" applies to aliens who have been granted permanent resident status in the United States as opposed to those who are merely residing in the country on a temporary basis. *Bourke*, 819 So.2d at 1022. The court expressly overruled any prior decisions to the contrary. *Id.*

Affleck applied for an equivalency determination pursuant to Rule XVII, Section 6.[3] On November 15, 2002, the Bar Admissions administrator informed Affleck that an equivalency determination would not be forthcoming because Affleck was neither a U.S. Citizen nor resident alien. Rec. Doc. 8, Exhibit 9. Affleck did not petition the Louisiana Supreme Court for a review of that denial pursuant to Section 9 of Rule XVII.[4] When this suit was filed, Leclerc, Jarry, and Boulord had not yet applied for equivalency determinations.[5] Although untimely under the Louisiana rules, Leclerc, Jarry and Boulord submitted equivalency applications after Defen-

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[3] Louisiana's bar admission rule provides:

> An applicant who has graded from a law school that is not located in the United States or its territories must submit an application to the Committee for an equivalency determination. Such application shall be in addition to all other applications required by this rule.

La. S.Ct. R. XVII, § 6(A).

[4] The pertinent text of Section 9 of Rule XVII is located at note 7 *infra*.

Jarry did attempt to petition the Louisiana Supreme Court for permission to take the bar exam. However, he did so without completing any of the requisite steps to apply for admission through the Committee. The Court therefore rejected his petition as premature. *In re Royer*, 836 So.2d 627 (La. 2003).

[5] Leclerc, Jarry and Boulord claim that they would have timely submitted equivalency applications but for the experiences of Nathalie Royer, Veronique, Mart, and Celine Mogues. Royer, Mary and Mogues received favorable equivalency determinations but their applications to sit for the bar were denied due to their residency status. Royer, Marty, and Mogues sought writs in the United States Supreme Court but their application was untimely. After this suit was filed and Defendants raised the case or controversy arguments, Leclerc, Jarry, and Boulord then filed applications for equivalency.

dants argued (in their motion to dismiss) that Plaintiffs lacked standing to bring this suit.[6]

On March 6, 2003, Plaintiffs Leclerc, Jarry, and Boulord filed their original complaint seeking declaratory relief and injunctive relief against Defendants as well as costs and attorney's fees. Plaintiffs named as defendants six of the seven Louisiana Supreme Court Justices — Jeffrey P. Victory, Jeanette Theriot Knoll, Chet D. Traylor, Catherine D. "Kitty" Kimball, John L. Weimer, and Bernette Joshua Johnson ("the Justices"), Daniel A. Webb, Chairman of the Louisiana Committee on Bar Admissions, and Harry J. Phillips, Jr., Vice-Chairman of the Louisiana Committee on Bar Admissions ("the Bar Admissions Officials") (collectively "Defendants"). All Defendants were sued in their official capacities only.

The Court held a status conference on March 20, 2003, and set deadlines for briefing on cross motions for summary judgment: Rec. Doc. 7. Plaintiff Affleck joined this suit via amended complaint on March 27, 2003. Defendants moved to stay all discovery pending a determination on their immunity defenses and on May 1, 2003, the magistrate judge granted a stay. Rec. Doc. 17. Plaintiffs' appeal of that order is currently before the Court and is inextricably intertwined with the arguments raised in Defendants' motion to dismiss.

Pursuant to the Court's scheduling order, Plaintiffs filed their fully-briefed motion in support of declaratory relief[7] and

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[6] Louisiana's bar admission rules require that equivalency applications for those applicants wishing to take the July 2003 bar exam were due no later than December 1, 2002. La. S.Ct. R. XVII, § 6(A).

[7] After Defendants questioned whether the Federal Courts Improvement Act of 1996, 110 Stat. 3847, 2853 (1966) (amending 42 U.S.C. § 1983), would permit injunctive relief against the state's judicial officers, Plaintiffs moved to amend their complaint to drop the request for injunctive relief. Rec. Doc. 27. The Court denied

Defendants filed their fully-briefed motion to dismiss. Both motions were set for hearing on May 21, 2003. On May 21, 2003, the Court held a status conference at Plaintiffs' request and at Plaintiffs' urging the motions were continued for hearing on June 4, 2003. The Court ordered supplemental briefing on Plaintiffs' immigration status, and on June 25, 2003, the Court heard oral argument.

In their motion for summary judgment Plaintiffs pray for a judgment:

> 1. Declaring the unconstitutionally of Section 3(B) of Rule XVII of the Rules of the Louisiana Supreme Court as interpreted by that Court to deny bar admission to "non-resident aliens";
>
> 2. Declaring that Section 3(B) of Rule XVII of the Rules of the Louisiana Supreme Court as interpreted by that Court is preempted by the plenary power of the Federal Government to set immigration policy;
>
> 3. Declaring that the Louisiana Supreme Court and the Louisiana Committee on Bar Admissions may not constitutionally deny plaintiffs the opportunity to sit for the Louisiana state bar examination solely on account of the fact that they are not citizens or resident aliens and to permit them to submit an application package, including that for equivalency determination if one has not already been submitted, so as to permit them to sit for the Louisiana state bar examination in July 2003, provided that they meet all other requirements of Rule XVII, as reasonably interpreted;
>
> 4. Awarding Plaintiffs reasonable costs and attorney's fees under 42 U.S.C. § 1998.

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the motion to amend for reasons unrelated to the request for injunctive relief.

Defendants assert that Plaintiffs fail to present a justiciable case or controversy because their claims are not ripe for adjudication and because Plaintiff lack standing. Defendants further argue that Plaintiffs' claims are barred by the Eleventh Amendment and the doctrines of judicial immunity and/or legislative immunity. Finally, Defendants argue that Plaintiffs' complaint fails to state a claim upon which relief can be granted. Alternatively, Defendants urge the Court to abstain from this matter. The Court addresses each argument in turn.

II. Defendants Motion to Dismiss

A. Legal Standards

A litigant may object to a court's lack of jurisdiction through a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Jurisdictional defects include immunity of the defendants in an action and the court's consequent lack of subject matter jurisdiction. *Bank One Texas v. United States*, 157 F.3d 397, 403 & n. 12 (5th Cir. 1998). Under Rule 12(b)(6), a court must dismiss a complaint that fails to state a claim upon which relief can be granted. When considering a Rule 12(b)(6) motion to dismiss, the court views all material allegations in plaintiff's complaint as true. *See In re Mastercard, Int'l, Inc.*, 313 F.3d 257, 261 (5th Cir. 2000). Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss. *Id.*

B. Case or Controversy

Defendants assert that Plaintiffs rest their claim on factual assumptions and conjecture that do not present a "case" or "controversy" under Article III of the United States Constitution. Thus, Defendants assert that Plaintiffs' claims are not ripe for adjudication and that Plaintiffs lack standing to pursue their asserted claims.

Defendants point out that Leclerc, Jarry and Boulord have taken none of the required steps in order to sit for the Louisiana bar exam. Thus, Leclerc, Jarry and Boulord have not been subject to any adverse action by Defendants on any basis including their alienage. Defendants point out that Leclerc, Jarry and Boulord must obtain equivalency determinations for their foreign law school educations, and that an adverse determination on equivalency would moot any issue as to their residency status. Because Leclerc, Jarry, and Boulord have been subject to no adverse action, Defendants argue that they also lack standing to bring this suit because they seek redress for an injury that has not and may never occur.

Defendants concede that Affleck submitted a timely application for an equivalency determination and that her application was not considered due to her status as a non-resident alien. However, Defendants contend that Affleck has also a ripeness/standing problem because she did not avail herself of the review procedures provided in Supreme Court Rule XVII, Section 9.[8] Defendants contend that at the conclusion

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[8] Rule XVII, Section 9, Denial of Eligibility; Appeals, provides:

> Upon notice to the applicant by the Committee that an applicant has failed to fulfill one or more of the requirements of Sections 3 or 5, or upon notice to the applicant from the Committee that the equivalency panel has found that applicant's legal education is not equivalent to that received by a graduate of a law school approved by the American Bar Association as required by Section 6, and that the Committee concurs in such finding, the applicant may appeal by petition directly to the Court.
>
> (B) Procedure in Supreme Court. The Court may, in its discretion, without taking further evidence, affirm or reverse the Committee's recommendation, remand to the Committee for further action as the Court instructs, or appoint a Commission to take evidence.

La. S.Ct. R. XVII, § 9.

of that appeal process, which all Plaintiffs would be required to complete, the *Rook-Feldman* doctrine would then have deprived this Court of jurisdiction to consider Plaintiffs' claims.[9]

Although she did not avail herself of the review procedures provided in the Supreme Court rules, Affleck asserts that federal law does not require exhaustion of state remedies prior to bringing a claim alleging violations of federal law. Moreover, she asserts that any appeal would have been futile anyway. Given then that the bar committee has cited Affleck's alienage as the basis for refusing to consider her equivalency application, Affleck asserts that she has a justiciable claim.

Leclerc, Jarry, and Boulord argue that Affleck's situation demonstrates the futility of submitting an equivalency application, and therefore, excuses their failure to seek equiva-

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[9] The *Rooker-Feldman* doctrine directs that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. *Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir. 1994) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462. Constitutional questions arising in state proceedings are to be resolved by the state courts. *Id.* Any alleged constitutional error in the state court judgment is to be reviewed and corrected by the appropriate state appellate court. *Id.* Thereafter, recourse at the federal level is limited solely to an application for a writ of certiorari to the United States Supreme Court. *Id.* The casting of a complaint in the form of a civil rights action cannot circumvent this rule, as absent a specific delegation "federal district court[s], as court[s] of original jurisdiction, lack[ ] appellate jurisdiction to review, modify, or nullify final order[s] of state court[s]." *Id.* (quoting *Kimball v. Florida Bar*, 632 F.2d 1283, 1284 (5th Cir. 1980)).

lency determinations.[10] Leclerc, Jarry, Boulord argue that concrete injury is surely imminent.[11]

In reply, Defendants clarify that they are not arguing that any type of administrative exhaustion applies to Plaintiffs' constitutional claims.[12] Rather, Defendants argue that Plaintiffs must receive a definitive adverse action before they may complain of a constitutional violation. Until Plaintiffs pursue their applications through the review and appeal procedures provided for in the Louisiana Supreme Court rules, no plaintiff has received a definitive adverse action for purposes of standing and ripeness.

Article III of the United States Constitution limits federal courts to the decision of "cases" and "controversies." *Shields v. Norton*, 289 F.3d 832, 834-35 (5th Cir. 2002). Ripeness and standing are two "justiciability doctrines" developed by federal courts to give meaning to the case or controversy requirement. *United Transportation Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). Thus, ripeness and standing are both constitutional prerequisites to the exercise of jurisdiction.

Ripeness

A matter is ripe only where an "actual controversy" exists. *Shields*, 289 F.3d at 835 (citing 28 U.S.C. § 2201(a)). Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that

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[10] As discussed at note 3 *supra*, Jarry submitted a procedurally improper petition to the Louisiana Supreme Court.

[11] Plaintiffs' counsel informed the Court at the April 17, 2003, status conference that Leclerc, Jarry and Boulord had submitted equivalency applications after they filed suit.

[12] Indeed, it is well-established that administrative exhaustion does not apply to civil rights claims unless specifically mandated by Congress. *Porter v. Nussle*, 534 U.S. 516, 523; *Turner v. Houma Municipal Fire*, 2002 WL 1467876 (E.D. La. Jul. 8, 2002).

are appropriate for judicial review. *United Transportation*, 205 F.3d at 857 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99. A case is generally ripe if any remaining questions are purely legal ones. *Id.* (*quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987).). Conversely, a case is not ripe if further factual development is required. *Id.* When challenging a statute or rule, ripeness may require that the rule be evaluated in light of a particular situation rather than a hypothetical one. *See Texas v. United States*, 523 U.S. 296, 301.

The Court is not persuaded that Plaintiffs' claims are not ripe for adjudication. Both parties agree that no further factual development is necessary in this litigation. The only issues now before the Court are strictly legal ones. Clearly, an actual controversy exists between the parties.

Further, this case does not involve the speculative and hypothetical type of injury at issue in those cases where plaintiff's challenge to a statute has been rejected as premature. For instance Defendants cite *National Park Hospitality Association v. Department of the Interior*, 538 U.S. 803, in support of their ripeness argument. In *National Park*, plaintiffs made a facial challenge to a federal law whose scope was unclear. Plaintiffs argued that the uncertainty as to the statute's application was causing them injury in that they could not adequately prepare bids for certain government contracts. The Court rejected that contention and concluded that judicial resolution of the statute's application should await a concrete dispute about a particular contract. 123 S.Ct. at 2032-33.

In contrast, the Louisiana Supreme Court has already applied Rule XVII in at least one particular instance in this litigation, *i.e.*, Affleck's application. Her application for equivalency was denied solely due to her residency status. Based on the Louisiana Supreme Court's decision in *In re*

Bourke, 819 So.2d 1020 (La. 2002), and in *In re Schnyder*, 824 So.2d 1135 (La. 2002), as well as the experiences of Royot, Marty, and Moguen, there is no reason to think that the Supreme Court would have granted Affleck relief had she pursued the appeal process. Likewise, there is no reason to believe that Leclerc, Jarry and Boulord would have been any more successful than Affleck, Bourke and Schnyder. Accordingly, Plaintiffs' claims are ripe for adjudication.

Standing

To satisfy the standing requirement, the plaintiff must have suffered an injury in fact. *Southern Christian Leadership Conf. v. Supreme Court of the State of Louisiana*, 252 F.3d 781, 787 (5th Cir. 2001). An "injury in fact" is an invasion of a legally protected interest which is both (a) concrete and particularized, and (b) actual or imminent and not conjectural or hypothetical.[13] *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555. Plaintiff cannot establish standing by relying on an undifferentiated interest in the proper application of the law. *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998).

To establish standing to challenge an allegedly unconstitutional policy, as a general matter "a plaintiff must submit to the challenged policy." *Ellison v. Connor*, 153 F.3d 247, 254-55, (5th Cir. 1998) (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997)). In other words, a plaintiff "may not seek redress for injuries done to others." *Id.* (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163). However, in the Fifth Circuit, this threshold requirement for standing may be excused where the plaintiff makes a "substantial showing that application for the benefit . . . would have been futile." *Id.* (citing *Jackson-Bey*, 115 F.3d at 1096).

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[13] The injury must also be traceable to the defendant, and the injury must be redressible. *Southern Christian Leadership Conf. v. Supreme Court of the State of Louisiana*, 252 F.3d at 787. Those aspects of standing are not at issue in this case.

In *Ellison*, the Fifth Circuit applied this "futility exception" to plaintiff landowners who sought to challenge the constitutionality of a Corps of Engineers permitting decision. Defendants argued that plaintiffs lacked standing because they had not actually applied for, and been refused, a permit. However, the Corps had previously advised plaintiffs via letter that it would not allow construction on plaintiffs' land. The Fifth Circuit reversed the district court's finding of no standing. 153 F.3d at 254-55. The court concluded that it would be futile to require the plaintiffs to ask the Corps for a permit when the Corps had already made a determination that no permit would issue. *Id.* at 255.

Based on the foregoing, the Court has no doubt that Affleck has standing to challenge Rule XVII. The Bar Committee informed Affleck that her equivalency application would not be considered due to her residency status. The therefore suffered a concrete injury as a result of Rule XVII. Based upon the prior decisions of the Louisiana Supreme Court denying the petitions of other non-immigrant aliens the Court concludes that any petition to the Louisiana Supreme Court would have been futile.

Leclerc, Jarry, and Boulord present a far more difficult question because they took no steps in furtherance of submitting an application to sit for the bar exam prior to filing this lawsuit. Although they submitted equivalency applications *after* they filed this lawsuit, those applications appear to be untimely and therefore may be rejected by Defendants on grounds wholly unrelated to their residency status. However, without a doubt Defendants will eventually reject Leclerc, Jarry, and Boulord's applications due to their residency status given the Supreme Court's unequivocal position on the issue. The fact that Leclerc, Jarry, and Boulord will suffer injury due to Rule XVII is not conjectural or hypothetical. It just has yet to happen. Because their injury is certain to occur

and imminent, the Court concludes that they too have standing to challenge Rule XVII.[14]

In sum, Defendants' motion to dismiss based on Plaintiffs' failure to establish a case or controversy is DENIED.

C. Eleventh Amendment Immunity

Defendants argue that the Eleventh Amendment bars Plaintiffs' claims. Because all defendants are state officials sued in their official capacities, the state is the real party in interest. Therefore, Defendants argue, the Eleventh Amendment bars suit regardless of the relief sought.

Plaintiffs do not dispute that the Eleventh Amendment applies to the Justices as well as to the Bar Admission Officials. Plaintiffs assert, however, that sovereign immunity does not bar the prospective declaratory relief Plaintiffs seek. Plaintiffs argue that any assertion that the Eleventh Amendment bars suit regardless of the type of relief sought is contrary to established United States Supreme Court jurisprudence.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir. 1994) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495

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[14] The Court's resolution of the standing issue naturally has no relevance whatsoever as to whether Defendants will ultimately grant Plaintiffs' equivalency applications on the merits.

U.S. 299, 304, 110 S.Ct. 1868, 1871, 109 L.Ed.2d 264 (1990)). Although by its terms the Amendment applies only to suits against a state by citizens of another state, the Supreme Court interprets the Amendment as barring suits in federal court by citizens against their own states as well. *See Cox v. City of Dallas*, 256 F.3d 281, 307 (5th Cir. 2001) (citing *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 962, 148 L.Ed.2d 866 (2001)).

The Eleventh Amendment may not be evaded by suing state officers in their official capacities because such an indirect pleading device remains in essence a claim against the state. *Id.* (citing *Stem v. Ahearn*, 908 F.2d 1, 3 (5th Cir. 1990)). Eleventh Amendment relief is available to both the Louisiana Supreme Court and the Louisiana State Bar Association. *Southern Christian Leadership v. Supreme Court of State of Louisiana*, 61 F.Supp.2d 499, 505 (E.D. La. 1999) (citing *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986)).

However, where state officials are sued in their official capacities, the doctrine of *Ex parte Young* may operate as an exception to the Eleventh Amendment. *Cox*, 256 F.3d at 307 (citing *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). Under *Ex parte Young*, the Eleventh Amendment does not bar a suit against a state official alleged to be acting in violation of federal law. *Id.* The *Ex parte Young* doctrine is grounded on the concept that the state cannot authorize its officials to violate the Constitution and laws of the United States. *Id.* (citing *Ex parte Young*, 209 U.S. at 160, 28 S.Ct. 441, 52 L.Ed. 714). *Ex parte Young* only permits an award of declaratory or prospective injunctive relief, *i.e.*, to enjoin the future enforcement of an unconstitutional rule, regulation, or law. *See id.; Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 400 (7th Cir. 1996). Retrospective relief in the form of a money judgment in compensation for past wrongs — no matter how small — is barred. *Brennan v. Stewart*, 834 F.2d 1248, 1252 (5th Cir. 1988). The *Ex parte*

Young exception does not apply to state law claims. *See Pennhurst v. Halderman*, 465 U.S. 89, 105, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984) (noting that *Ex parte Young* is inapplicable where violations of state law are at issue).

In this case Plaintiffs' *federal* claims fall squarely within the *Ex parte Young* exception to Eleventh Amendment immunity. Plaintiffs have sued all defendants in their official capacities and seek only declaratory and prospective injunctive relief. Plaintiffs are not seeking monetary compensation for past wrongs. Therefore, Defendants are not entitled to dismissal of Plaintiffs' federal claims based upon Eleventh Amendment immunity. However, to the extent Plaintiffs are attempting to assert any type of state law claim, those state law claims are dismissed for lack of subject matter jurisdiction.[15]

In sum, Defendants' motion to dismiss based on Eleventh Amendment immunity is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED insofar as Plaintiffs are attempting to assert state law claims. The motion is DENIED as to Plaintiffs' federal claims.

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[15] Without citation of authority or explanation, Defendants concede that Plaintiffs Fourteenth Amendment claims are not barred by the Eleventh Amendment. Defendants' Motion to Dismiss at 13 n.6. For the reasons explained above, Defendants are correct. However, Fourteenth Amendment claims generally are subject to the Eleventh Amendment except where Congress expressly abrogates the state's immunity when legislating pursuant to its enforcement powers under the Fourteenth Amendment. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72, 120 S.Ct. 631, 640, 145 L.Ed.2d 522 (2000); *Santiago v. New York Dep't of Correct. Servs.*, 945 F.2d 25, 28 (2d Cir. 1991).

D. Absolute Immunity

1. Judicial Immunity

Defendants argue that judges are absolutely immune from suits based upon actions taken in their official *judicial* capacities. Further, Defendants point out that Congress enlarged judicial immunity via the Federal Courts Improvement Act of 1996 ("the FCIA") which specifically amended 42 U.S.C. § 1983.

Plaintiffs dispute whether the actions complained of were taken in Defendants' *judicial* capacities. Plaintiffs point out that their claims arise out of the way Defendants are enforcing an allegedly unconstitutional rule and therefore Defendants' actions have been taken in their enforcement capacities. Plaintiffs assert that the FCIA was not intended to erase the distinction previously made between actions taken in a judicial officer's *judicial* capacity versus those taken in *enforcement* and *administrative* capacities. Plaintiffs also assert that judicial immunity does not apply to the *declaratory* relief Plaintiffs seek.

Plaintiffs distinguish their case from those upholding judicial immunity by pointing out that their case is one questioning the constitutionality of a bar admissions rule generally as opposed to an aggrieved individual. Plaintiffs remind the Court that their challenge to Rule XVII is a facial one so that they are not challenging the adjudication of an individual application, *i.e.*, action taken in the officer's judicial capacity. As such, Plaintiffs argue that their claims are not barred by judicial immunity.

Three United States Supreme Court cases form an appropriate starting point for consideration of Defendants' judicial immunity defense. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736, 100 S.Ct. 1967, 1977, 64 L.Ed.2d 641 (1980), the Supreme Court held that judicial immunity did not bar injunctive relief against the Virginia

Supreme Court and its chief justice. Plaintiffs brought a facial challenge to an allegedly unconstitutional bar rule and sought to enjoin defendants from prospectively enforcing it against attorneys. In upholding the injunction, the Court distinguished between the various capacities in which the state's supreme court was authorized to act under state law. Thus, in conjunction with administering bar matters, the state's highest court engages in adjudicative duties (determining moral fitness of attorney applicants), legislative or rule-making duties (promulgating bar admission rules and procedures), and enforcement duties (applying the bar rules against attorneys or bar applicants), but judicial immunity would not *per se* apply to the latter two functions. In *Consumers Union*, the Court held that plaintiffs were entitled to declaratory and injunctive relief without regard to the defendants' status as judicial officers because the lawsuit arose out of their role as "enforcers" of the bar rules. Thus, like any state official who enforces laws, injunctive and declaratory relief were available notwithstanding that defendants were judicial officers. *Id.*

Four years later, in *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1981, 80 L.Ed.2d 565 (1984), the Supreme Court held that judicial immunity did not preclude declaratory and injunctive relief against a judicial officer acting in his or her *judicial* capacity. In *Pulliam*, plaintiff had challenged the constitutionality of a state judge's practice of incarcerating persons awaiting trial for nonincarcerable offenses — acts clearly taken in defendant's judicial capacity. Thus, in the wake of *Consumers Union* and *Pulliam*, judicial immunity did not apply to acts taken by judicial officers in their *enforcement* capacities and was not a bar to declaratory and injunctive relief for acts taken in the judge's *judicial* capacity.

Finally, in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), the Court again recognized the importance of properly categorizing a judicial officer's acts

for purposes of determining whether judicial immunity applies. In that case the Court found judicial immunity inapplicable where a state judge had been sued for sexual discrimination in employment-related matters. *Id.* at 229, 108 S.Ct. at 545. The Court noted that there is no immunity for "acts that simply happen to have been done by judges" when those acts are not judicial acts. *Id.* at 227, 108 S.Ct. at 544. Rather, the "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* Although the Supreme Court had never articulated a precise and general definition of the class of acts entitled to immunity, the Court recognized the "intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.* at 227, 108 S.Ct. at 544.

Consumers Union, *Pulliam*, and *Forrester* demonstrate that the question of judicial immunity in any given situation can only be answered with reference to the relief sought and the *capacity* in which the judge had acted. It is also clear that the Supreme Court in crafting judicial immunity over the years did not consider every act taken by a judge to be in his judicial capacity merely by virtue of the officer's status as a judge.

If *Consumer's Union*, *Pulliam*, and *Forrester* remain good law then Defendants' judicial immunity argument is without merit.[16] However, in 1996 Congress enacted the Federal Courts Improvement Act of 1996 which amended 42 U.S.C. § 1983 to provide that "in any action brought against a judicial officer for an act or omission taken in such officer's *judicial* capacity, injunctive relief shall not be granted

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[16] *Consumer's Union* is not inapplicable merely because that case dealt with provisions of the Virginia bar's code of ethics. *Consumer's Union* is applicable because it dealt with a facial challenge to the code of ethics rather than the application of the code of ethics to an individual attorney in disciplinary proceedings.

unless a declaratory decree was violated or declaratory relief was unavailable." Pub. L. No. 104-317, 110 Stat. 3847 (Oct. 19, 1996) (emphasis added). The Senate report indicates that the amendment "restores the doctrine of judicial immunity to the status it occupied prior to [*Pulliam*]" because *Pulliam* had departed from "400 years of common law tradition and weakened judicial immunity protections." S. Rep. 104-366, at *36-*37, 1996 U.S.C.C.A.N. 4202, 4216-17.

Defendants can make no colorable argument that the FCIA did anything to alter the landscape with respect to declaratory relief. Declaratory relief against judges acting in their judicial capacities was well-established before the FCIA. The FCIA amendments continue to contemplate declaratory relief by making express reference to it as a first step before injunctive relief is permissible. Moreover, the FCIA does not purport to eliminate the clear distinctions among the various capacities in which judicial officers act. The Supreme Court's jurisprudence had long been unequivocal in that the Court did not consider every act taken by a judicial officer to be a "judicial act" subject to judicial immunity. Therefore, Congress's decision to preclude injunctive relief when the judge acts specifically in his "judicial capacity" can only mean that injunctive relief remains available when the judicial officer acts in other capacities. This Court cannot make law. Had Congress intended for the amendment to apply regardless of which capacity the judge was acting, Congress would have said so. Likewise, had Congress intended to erase the long accepted capacity distinctions recognized by the High Court it would have used appropriate language.[17] Instead, Congress specifically refers to acts taken in the ***judicial*** capacity. The Court is persuaded

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[17] Interestingly, Defendants' own invocation of legislative immunity belies any assertion that they believe that the FCIA erased the recognized distinctions between the various capacities in which judges act.

that the FCIA does not bar injunctive relief where a judicial officer acts in other capacities such as enforcement capacity.

Defendants have argued strenuously that the FCIA protects them from injunctive relief because the acts of which Plaintiffs complain were performed in Defendants' *judicial* capacities. The Court is not so persuaded given the unique role that the Louisiana Supreme Court occupies under the state constitution and given that Plaintiffs are making a facial challenge to Supreme Court Rule XVII.

The Louisiana Constitution gives Defendants the exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, the discipline, suspension and disbarment of lawyers, and the client-attorney relationship. *Succession of Wallace*, 574 So.2d 348, 350 (La. 1991) (citing *LSBA v. Edwins*, 540 So.2d 294 (La. 1989); *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102, 109, 115 (La. 1979); *LSBA v. Connolly*, 201 La. 342, 9 So.2d 582 (1942); *Ex Parte Steckler*, 179 La. 410, 154 So. 41 (1934); *Meunier v. Bernich*, 170 So. 567 (La.App. 1936)). Consequently, the Louisiana Legislature cannot enact laws defining or regulating the practice of law in any aspect without Defendants' consent. *Id.* (citing La. Const. 1974, Art. II). Nor is any officer of the executive branch charged with enforcing bar rules. Thus, in conjunction with attorney and bar matters, the Louisiana Supreme Court acts in the role of all three branches of government. It acts as a legislative branch when promulgating rules, as a judicial branch when considering whether a particular applicant should be granted admission, and as an executive branch when it enforces or applies the very rules it makes. Clearly, had Plaintiffs been mounting a facial challenge to an unconstitutional statute passed by the legislature, the proper party defendant would be the executive branch state officer charged with enforcing that statute. In this case, due to the unique role of the Louisiana Supreme Court, Defendants are

those state officers. In sum, for the facial challenge Plaintiffs bring today, Defendants are the proper party defendants because they are charged with enforcing the allegedly unconstitutional rule. Thus, for a suit mounting a facial challenge Defendants are by clear implication being sued in their enforcement capacities.

Moreover, this conclusion is not at odds with the well-established principle that admission to a jurisdiction's bar is "peculiarly a judicial function." *McFarland v. Folsom*, 854 F.Supp. 862, 874 (M.D. Ala. 1994). Because Plaintiffs are mounting a facial challenge to Rule XVII and are not suing Defendants for any individual culpability in conjunction with Rule XVII, the "judicial function" aspects of judicial immunity are not at issue here. Thus, the Court concludes that Defendants are not entitled to judicial immunity for Plaintiffs' claims.[18]

In sum, Defendants' motion to dismiss based on judicial immunity is DENIED.

2. Legislative Immunity

Defendants assert that they are entitled to absolute legislative immunity from any suit related to bar admissions rulemaking. When the Justices and Bar Admissions Officials promulgate and implement bar admission rules they occupy the position of legislators.

In addition to Plaintiffs' arguments already recited regarding immunity, Plaintiffs assert that immunity does not extend to protect rules that are unconstitutional. Thus, re-

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[18] *Pulliam* also held that Plaintiff could recover costs and attorney's fees in conjunction with obtaining injunctive relief against a judicial officer for acts taken in her judicial capacity. The FCIA amended 42 U.S.C. Section 1988(b) to reverse that aspect of *Pulliam*. Because the attorney's fee issue is wholly premature at this time, the Court expresses no opinion as to whether Plaintiffs could ultimately recover costs and attorney's fees in this action.

gardless of the capacity in which Defendants are acting, a person's constitutional rights cannot be breached to prevent him/her from practicing law.

When exercising its sovereign rule-making authority, a state supreme court occupies the same position as that of the state legislature. *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)). Like legislators, the members of the state's highest court are entitled to absolute legislative immunity in conjunction with promulgating bar admission rules. *Consumers Union*, 446 U.S. at 730-34, 100 S.Ct. at 1974-75. Thus, legislative immunity would foreclose any suit based upon the issuance of, or failure to amend, a challenged bar admission rule. *Id.* at 734, 100 S.Ct. at 1976. The same immunity applies to members of a state bar association whose role is "completely defined by the court." *Lewis*, 792 F.2d at 497 (quoting *Bates*, 433 U.S. at 361, 97 S.Ct. at 2697).

Plaintiffs are making a facial challenge to the constitutionality of Rule XVII. They seek to enjoin its enforcement. None of their claims are directed at Defendants' role in having promulgated Rule XVII. Accordingly, legislative immunity is inapplicable. Defendants' motion to dismiss based on legislative immunity is DENIED.

E. Abstention

Defendants argue that the Court should exercise its discretion to abstain from this matter pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). Defendants point out that this matter involves questions of state law that are uniquely within the knowledge and expertise of the Louisiana Supreme Court. Therefore, the Louisiana Supreme Court, and not the federal judiciary, should oversee and administer Louisiana's bar admission rules.

In opposition, Plaintiffs argue that *Burford* abstention is inappropriate because no difficult questions of state law are involved in this case. Rather, Plaintiffs challenge Section 3(B) of Rule XVII on *inter alia* federal constitutional grounds. Thus, there is no justification for this Court to abdicate its jurisdiction.

While federal courts have a strict duty to exercise jurisdiction that is conferred upon them by Congress, the duty is not absolute. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996). Keeping in mind that abstention is the exception and not the rule, federal courts may decline to exercise their jurisdiction in circumstances where denying a federal forum would clearly serve important countervailing interests such as considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration. *Id.* In exercising their discretion, federal court must "fit within the narrow and specific limits prescribed by the particular abstention doctrine involved." *Webb v. B.C. Rogers Poultry Inc.*, 174 F.3d 697, 701 (5th Cir. 1999) (quoting *Clark v. Fitzgibbons*, 105 F.3d 1049, 1051 (5th Cir. 1997)). The *Burford* abstention doctrine allows federal courts to dismiss a case only if it presents

> [D]ifficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Quackenbush, 517 U.S. at 707, 116 S.Ct. at 1716 (quoting *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244-45).

Without doubt this lawsuit involves questions of substantial state concern. There is no question that bar admission is distinctly a matter in which Louisiana has substantial interests. Unarguably, the Louisiana Supreme Court has unique

knowledge and familiarity with the considerations at stake when licensing lawyers.

Notwithstanding, Plaintiffs' claims do not involve the "difficult questions of state law" required for *Burford* abstention. Plaintiffs' claims are based solely on federal law. The meaning of Supreme Court Rule XVII is not at issue in this suit. The only issue is whether that rule is in conflict with various federal laws. Thus, the threshold requirement for *Burford* abstention is not present in this case.

Furthermore, Defendants' abstention argument is less persuasive given that many of Plaintiffs' federal arguments have already been presented to and rejected by the Louisiana Supreme Court. *See In re Bourke,* 819 So.2d 1020 (2002). At this time, there are no pending state court proceedings in which this Court need fear of interfering.

For the foregoing reasons the Court declines to exercise its discretion to abstain from this matter.

III. Plaintiffs' Motion For Summary Judgment

Plaintiffs move for summary judgment on their claims for declaratory relief. They assert that all facts are contained in the pleadings and that none of the relevant facts are in dispute. Plaintiffs point out that because this action results from the unconstitutionality of Louisiana Supreme Court Rule XVII, Section 3(B), and the Rule's blanket application to non-immigrant aliens, it is clear that no facts exist which could be contentious or that might affect the result of the action. Plaintiffs assert that the record indicates that the only genuine issue is one of constitutionality, and therefore, the case is ripe for summary adjudication.[19]

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[19] Defendants did not file a cross motion for summary judgment but filed a motion to dismiss instead. Defendants' arguments in opposition are taken from their motion to dismiss which Defen-

A. Legal Standards

In determining whether a party is entitled to summary judgment, the court views the evidence in the light most favorable to the non-moving party. *Littlefield v. Forney Indep. School Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (citing *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998); *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 608 (5th Cir. 1998)). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The moving party bears the burden, as an initial matter, of showing the district court that there is an absence of evidence to support the nonmoving party's case. *Id.* (citing *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2548, 106 S.Ct. 2548). If the moving party fails to meet this initial burden, the motion must be denied regardless of the nonmoving party's response. *Id.*

B. Constitutional Claims

Notwithstanding the plenary power of the state's highest court to regulate the practice of law, a state cannot exclude a person from the practice of law for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). Regardless of whether a state's grant of permission to practice law is a "right" or "privilege," a person cannot be prevented from practicing law except for valid reasons. *Id.* n.5 (citing *Ex parte Garland*, 4 Wall. 333, 379, 18 L.Ed. 366 (1866)).

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dants have also designated as their opposition to Plaintiffs' motion for summary judgment.

1. Due Process Claims

Plaintiffs assert that they were entitled to a hearing, the presentation of evidence to prove their allegations, and to the disclosure of whatever information and recommendations were presented to the Louisiana Supreme Court by the Louisiana State Bar Association Committee on Admissions. Plaintiffs assert that they were denied their due process rights when the Louisiana Supreme Court overruled its prior *jurisprudence constante* without giving Plaintiffs an opportunity to be heard.

Defendants argue, that Plaintiffs do not state a claim for a procedural due process violation nor a substantive due process violation. Defendants point out that none of the Plaintiffs availed themselves of the state review procedures and therefore can claim no due process violation. Defendants argue that a substantive due process claim only protects "fundamental rights" and that there exists no fundamental or constitutional right of a non-lawyer to practice law.

The Court has reviewed the authorities cited by Plaintiffs in support of their contention that they were denied due process of law and concludes that Plaintiffs fail to state a claim for a due process violation. While *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), does require that a denial of an application to practice law must comport with principles of procedural due process, the case does nothing to support the contention that Leclerc, Jarry, Boulord, and Affleck have been denied procedural due process. *Willner* requires the state to inform an applicant of the reasons his application is being denied and to permit a hearing thereafter. *Id.* at 105, 83 S.Ct. at 1181. Affleck was given the specific reasons for Defendants' refusal to consider her equivalency application. The Supreme Court rules expressly permitted her to petition the Louisiana Supreme Court and to request a hearing. *Willner* requires no more. Affleck cannot claim a procedural due process viola-

tion as a result of her own failure to pursue the state procedural r[illegible]edies available to her. Given that Leclerc, Jarry, and Bo[illegible]d made no attempt, prior to filing this law suit, to submit an application to the Committee, they clearly have no claim for a procedural due process violation.

Likewise, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), does not persuade the Court that Plaintiffs have stated a claim for a substantive due process violation. In *Schware*, the United States Supreme Court held that the state had impermissibly applied its moral fitness standards to exclude plaintiff from practicing law. *Id.* at 247, 77 S.Ct. at 760. The Court held that the state had deprived plaintiff of due process of law because the record was wholly insufficient to support the state's finding of bad moral character. *Id.*

In the instant case, Plaintiffs are mounting a facial challenge to Supreme Court Rule XVII. *Schware* does not provide Plaintiffs a cause of action for a substantive due process violation in conjunction with a facial challenge. Instead *Schware* would allow an applicant aggrieved of the state's bar admission process to mount a due process challenge based upon his *individual* situation. If Plaintiffs had hoped to make such a claim then their appropriate course of action would have been to pursue the state procedures for appeal and then to seek certiorari in the United States Supreme Court as Schware had done. Even if Plaintiffs had done so, the *Rooker-Feldman* doctrine would have precluded such a substantive due process claim brought as an original action in this Court.

In sum, Plaintiffs' complaint fails to state a claim for deprivation of due process. Accordingly, Defendants' motion to

dismiss is GRANTED with respect to Plaintiffs' due process claims.[20]

2. Equal Protection Claim

Plaintiffs argue that Rule XVII, Section 3(B) violates the equal protection clause. Plaintiffs assert that alienage is a suspect classification which triggers strict scrutiny for purposes of an equal protection challenge. Plaintiffs assert that Defendants have given no justification for Rule XVII much less one that could withstand strict scrutiny. Plaintiffs further contend that even under a lower level of scrutiny, Rule XVII cannot withstand attack. Plaintiffs assert that an individual's residency status is wholly unrelated to his or her character and therefore is not a permissible criterion for bar admission purposes. Plaintiffs assert that *In re Griffiths*, 413 U.S. 717,

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[20] Plaintiffs' various memoranda suggest that they were denied due process because the Louisiana Supreme Court reversed its prior stance on the residency issue without giving Plaintiffs an adequate explanation and prior notice of the court's intention. This contention is absurd.

Further, Plaintiffs complaint that Defendants have never expressed publicly the reason for their change in policy regarding non-resident aliens. Rec. Doc. 12 at 9. It is clear from Plaintiffs' original complaint in this Court as well as the *Royot, et al.* petition for certiorari filed with the United States Supreme Court that Plaintiffs believe that the Louisiana Supreme Court's sudden reversal on the alien issue was prompted by the participation of foreign lawyers in Louisiana death penalty cases. Even though the Court finds this allegation highly speculative and questionable, as explained in *Southern Christian Leadership Conference*, unpopular motivations (even if substantiated) do not transform a challenged rule "into an unconstitutional state action." 252 F.3d at 794-95.

Finally, the Court fails to comprehend the relevance of other state bar admission rules to any of the legal issues in this case.

93 S.Ct. 2851, 37 L.Ed.2d 910, (1973), clearly supports their claims.

Citing *Southern Christian Leadership Conference v. Supreme Court of Louisiana*, 252 F.3d 781, 786 (5th Cir. 2001), Defendants contend that Plaintiffs have failed to state a claim for a constitutional violation because there is no fundamental right for a non-lawyer to practice law. Simply said, Plaintiffs have no constitutional right to sit for the Louisiana bar exam and this circuit consistently recognizes the plenary power of the Louisiana Supreme Court to regulate the practice of law.

Defendants argue that *In re Griffiths* is legally and factually dissimilar from this case and therefore does not support Plaintiffs' claims. Defendants assert that Louisiana's decision not to offer bar admission to those persons with truly temporary status, and who are therefore transient, falls within the valid and legitimate exercise of the State's public safety and police power.

While there may be no constitutional right for admission to a state's bar, admission policies and procedures cannot run afoul of the Equal Protection Clause. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). The Equal Protection Clause of the Fourteenth Amendment directs that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)). However, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as if they were the same." *Id.* (alteration in original) (quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940)). Aliens are "persons" guaranteed equal protection of the laws. *Id.* at 210, 102 S.Ct. at 2391.

Well-established principles of constitutional law hold that classifications upon a suspect class or classifications that af-

fect fundamental rights are subject to strict scrutiny review. *Hatten v. Rains*, 854 F.2d 687, 690 (5th Cir. 1988) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973)). Such laws are presumptively invalid unless the state can demonstrate that the law is the least restrictive means to achieve a compelling state interest. *See id.*; *In re Griffiths*, 413 U.S. at 721, 93 S.Ct. at 2855. Rarely, if ever, will laws survive challenge at this level of scrutiny. *Bernal v. Fainter*, 467 U.S. 216, 220 n.6., 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984) ("As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact.")

However, classifications which operate upon a quasi-suspect class are accorded intermediate scrutiny, and must bear a significant relationship to an important state end. *Id.* (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981)). All other classifications need only bear a rational relationship or basis to a legitimate legislative end. *Id.* (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).

Hence, the threshold issue in any equal protection analysis is the level of scrutiny to be applied. The applicable level of scrutiny is of paramount importance to the parties because the level of scrutiny applied often serves as the bellwether of the statute's validity. Naturally then, Plaintiffs herein are arguing for strict scrutiny and Defendants, while not specifically addressing the appropriate level of scrutiny, have implicitly argued for rational basis review.[21]

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[21] Defendants assert Rule XVII "falls within the valid and legitimate exercise of the State's public safety and policy powers." Defendants' Motion to Dismiss at 17 n.10. Such a justification is consistent with rational basis review. At oral argument, defense

Although the United States Supreme Court has repeatedly used strict scrutiny to invalidate state laws applying classifications based upon alienage, none of those cases involved temporary, nonresident aliens such as Plaintiffs herein.[22] Rather, in all cases where the Court applied strict scrutiny, the affected aliens were ***permanent resident*** aliens. *See, e.g., Bernal v. Fainter*, 467 U.S. 216, 220 n. 6, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984) (invalidating a state law precluding permanent resident aliens from becoming notaries); *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973) (invalidating a state law precluding permanent resident aliens admission to the state bar). Although the equal protection challenge in *Toll v. Moreno*, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982), involved a nonresident (non-immigrant) alien, the Court expressly declined to consider the case on equal protection grounds opting instead to strike the law based on preemption.[23]

However, in his dissenting opinion, then Justice Rehnquist discussed how the fundamental differences be-

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counsel confirmed Defendants' position that rational basis review should apply.

[22] It is now widely accepted that federal laws creating classifications based upon alienage need only satisfy rational basis review. *Abreu v. Callahan*, 971 F. Supp. 799, 810 (S.D.N.Y. 1997) (citing *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)). In other words, classifications among aliens that are wholly permissible for Congress to make are for the most part off limits to the states. *See Takahashi*, 334 U.S. at 418-19, 68 S.Ct. at 1142.

[23] One commentator has suggested that the Court's choice of the preemption analysis in *Toll* was a product of the Court's hesitation to apply strict scrutiny to categories of non-resident aliens. Linda S. Bosniak, *Membership, Equality & the Difference That Alienage Makes*, 69 N.Y.U. L.Rev. 1047, 1149 n. 251 (1994). The district court in *Toll* had applied strict scrutiny.

tween permanent resident aliens and non-resident aliens should preclude the Court's ever applying strict scrutiny analysis where non-immigrants are involved. *Toll*, 458 U.S. at 25, 102 S.Ct. at 2990 (Rehnquist, J., dissenting). The crux of his argument was that resident aliens are so much like citizens that distinctions among them should be carefully scrutinized.[24] *Id.* at 45, 102 S.Ct. at 3000. Non-immigrant aliens, on the other hand, are sufficiently different from citizens and immigrant aliens in relevant respects that distinctions between then should not call for heightened scrutiny. *Id.* Since *Toll*, the Supreme Court has not yet decided the applicable level of scrutiny applicable to non-resident aliens. Lower court opinions have gone both ways without an in depth analysis as to why strict scrutiny was or was not applied. *See, e.g., Ahmed v. University of Toledo*, 664 F.Supp. 282 (N.D. Ohio 1986) (applying rational basis review); *Tayyari v. New Mexico State Univ.*, 495 F.Supp. 1365 (D.N.M. 1980) (applying strict scrutiny).

At oral argument, Plaintiffs' counsel argued that strict scrutiny should be expanded to include temporary non-resident aliens because there are no reasonable differences between resident and non-resident aliens. Therefore, Plaintiffs argued, all lawful aliens should comprise a suspect class.

Perhaps all lawful aliens should comprise a suspect class. However, the current state of the law is that the United States Supreme Court has not yet treated non-immigrant aliens as a suspect class. In *Toll* the Court had the opportunity but chose, not to do so. Instead the Court decided the case on much narrower grounds. Since the U.S. Supreme Court

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[24] Even Justice Brennan, who authored the majority opinion in *Toll*, noted that "when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of [the principles applicable to resident aliens] is likely to be a matter of some dispute." *Toll*, 458 U.S. at 13, 102 S.Ct. at 2984.

chose not to expand strict scrutiny status to non-immigrant aliens, this Court finds no basis to do so. The Supreme Court reluctantly creates new suspect classes because each new expansion involves the invalidation of virtually every classification bearing upon the newly created suspect class. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318, 96 S.Ct. 2562, 2569, 49 L.Ed.2d 520 (1976) (Marshall, J., dissenting).

Moreover, the Supreme Court's rationale for applying strict scrutiny to resident aliens was largely based on the compelling similarities between permanent resident aliens and citizens. *See Griffiths*, 413 U.S. at 722, 93 S.Ct. at 2855; *Nyquist v. Mauclet*, 432 U.S. 1, 12, 97 S.Ct. 2120, 2126-27, 53 L.Ed.2d 63 (1977). Given the similarities between citizens and resident aliens, state-based distinctions among them merit strict scrutiny. However, non-immigrant aliens differ from immigrant aliens and citizens in a fundamental respect — they are admitted to this country on a temporary basis and for limited purposes. Thus, this Court finds no strict scrutiny to be inapplicable in this case.

The more difficult question is whether rational basis review should apply or perhaps some intermediate or heightened level of scrutiny that falls somewhere along the strict scrutiny/rational basis review extremes. The United States Supreme Court or even the Fifth Circuit might very well alight on some middle ground analysis given how solicitous the Supreme Court has been of protecting resident aliens. This Court, however, declines the invitation to create a new quasi-suspect class or foray into the "intermediate scrutiny thicket." The Court therefore opts for rational basis review.

Defendants argue that Rule XVII, Section 3(B) passes rational basis review because the Louisiana Supreme Court has a legitimate interest in insuring that litigants in the state's courts are represented not only by competent lawyers but by lawyers who are not subject to having their residency re-

voked on relatively short notice, or at best lawyers who are only in this country temporarily. Defendants point out not only the potential disruption to the courts' dockets but also the prejudice that clients could suffer if a lawyer is forced to leave the country in the midst of litigation or perhaps even a trial. Surely, both parties are aware that litigation can span years and might often times last longer than the time Congress would allow a temporary alien to remain in the United States. A client's representation is therefore subject to disruption for reasons completely beyond the lawyer's control — reasons of which the client might very well be unaware when he retains counsel.

At oral argument, defense counsel pointed out the near impossibility of tracking down client files, evidence, etc. should a non-resident alien be forced to leave the United States on unfavorable and sudden terms. Counsel posited that the Louisiana Supreme Court would lack any type of disciplinary recourse against an alien lawyer once deported and outside of any state bar's jurisdiction.

Unarguably, the Defendants' proffered reasons do satisfy rational basis review. Rule XVII, Section 3(B) is clearly related to Defendants' legitimate interest in insuring that litigants are represented by counsel who will be in this country when those litigants finally have their day in court. Consequently, Plaintiffs' motion for summary judgment is DENIED on the equal protection claim.

C. Federal Preemption

Plaintiffs argue that Rule XVII is invalid because only the United States has the exclusive power to establish rules governing immigration, foreign policy, and the rights of non-citizens, and that this power is binding on the states by way of the Supremacy Clause.

The authority to control immigration, that is to admit or exclude aliens, is vested solely in the federal government.

Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416, 68 S.Ct. 1138, 1141, 92 L.Ed. 1478 (1948) (citing *Fong Ye Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 1022, 37 L.Ed. 905, 913). The Constitution grants the states no authority over immigration matters. *Id.* at 419, 68 S.Ct. at 1142. Thus, state laws which impose "discriminatory burdens" upon the entrance or residence of aliens lawfully within the United States are in conflict with federal law and are therefore invalid. *Id.* In such a situation, the Supremacy Clause dictates that federal law must prevail. *See Toll v. Moreno*, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982); U.S. Const. art. VI, cl. 2.

However, every state enactment which in any way deals with aliens is not necessarily a regulation of immigration and thus per se pre-empted by federal law. *DeCanas v. Bica*, 424 U.S. 351, 354, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976). In other words, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* A regulation of immigration is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. *Id.* If the regulation or statute does not regulate immigration, then the court will determine whether the regulation or statute conflicts with federal law. If no conflict exists, then there is no preemption. *Id.* at 356-58, 96 S.Ct. at 936-38. However, even where no direct conflict exists, state laws will be preempted where they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the [immigration laws]." *Id.* at 363, 96 S.Ct. at 940. Simply said, states have no power to "add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States." *DeCanas*, 424 U.S. at 358 n.6, 96 S.Ct. at 938.

In *Toll*, the Supreme Court invalidated Maryland's policy of denying non-immigrant aliens the ability to obtain "in-

state" status for purposes of reduced tuition and fees. 458 U.S. at 10, 102 S.Ct. at 2982. The state had argued that the higher fees were an appropriate measure to make up the Congressional tax breaks given to certain aliens. The court concluded that Maryland's practice of charging higher tuition and fees to the non-immigrant aliens frustrated Congress's policy of giving state tax breaks to G-4 visa holders. *Id.* at 16, 102 S.Ct. at 2985-86. The Court was persuaded that a state could not recoup indirectly from the non-immigrants what the federal government had expressly barred the state from collecting. *Id.* The crux of the *Toll* holding is that a state cannot regulate aliens in such a way so as to deprive aliens of benefits and advantages that Congress specifically intended for those aliens to have while residing in this country.

Supreme Court Rule XVII, Section 3(B) has no arguable relevance or impact on who is admitted into the United States. Plaintiffs argue that the Rule is nevertheless a regulation of immigration because it regulates the conditions under which a legal entrant may remain in this country. Plaintiffs' argument is unpersuasive because it requires a far broader interpretation of "conditions under which an [alien] may remain" that what the Supreme Court's jurisprudence would allow. Under Plaintiffs' argument, any state law that affected aliens would be a regulation of immigration. However, the United States Supreme Court expressly rejected that suggestion in *DeCanas v. Bica, supra.* A more likely reading of "conditions under which an [alien] may remain" would be one encompassing laws that affect an alien's ability to remain in a specific jurisdiction. For instance, no state could enact a law requiring deportation based upon the alien's conduct within the state. Such a law would clearly be one setting conditions under which an alien could remain in the jurisdiction, and such a law would surely be invalid. Rule XVII does not set conditions under which an alien may remain in

this country or this state and it is therefore not a regulation of immigration subject to *per se* preemption.

Further, Plaintiffs cite no specific conflicts between Rule XVII and federal immigration law or Congressional policy. *Toll* and *DeCanas* demonstrate that Congress has not preempted the field of law applicable to aliens. Thus, absent a law being a regulation of immigration, a true conflict must exist between the challenged regulation and Congressional policy. At the very least, the challenged regulation must in some way frustrate Congress's policy regarding aliens in order for preemption to apply. Looking to the types of visas pursuant to which Plaintiffs reside in the United States, the Court can discern no such tension between Rule XVII and federal immigration law.

Leclerc, Jarry, and Boulard entered and remain in the United States pursuant to J-1 visas, also known as exchange visas.

> J-class aliens are those aliens having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training....

8 U.S.C. § 1101(a)(15)(J).

Affleck entered and r ins in the United States pursuant to an L-2 visa. An L-2 vis issued to the spouse of an L-1 visa holder. Affleck's spouse is an L-1 class alien which is an alien

> who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation . . . and who seeks to enter the United States temporarily in order to continue to render his services to the same employer . . . in a capacity that is managerial, executive, or involves specialized knowledge. . . .

8 U.S.C. § 1101(a)(15)(L).

J-visas and L-visas are therefore temporary by design. At oral argument counsel informed the Court that J-visas usually entail an eighteen month or so stay in the United States. Affleck has a temporary Employment Authorization Document ("EAD") and has applied for a permanent one.

At oral argument, Plaintiffs argued that Rule XVII, Section 3(B) is inconsistent with the advantages Congress bestowed on them by virtue of their respective immigration visas. The Court disagrees given that the sole effect of Rule XVII upon Plaintiffs is that they cannot obtain licenses to practice law. Leclerc, Jarry, and Boulord can do everything enumerated in the definition of J-class aliens without a license to practice law. Moreover, the practice of law as a licensed attorney lacks congruency with the other teaching and research oriented aspects of J-classification. The inability to obtain a law license simply does not pose an obstacle to Plaintiffs' ability to obtain any of the benefits and advantages associated with having a J-visa. Consequently, a federal preemption does not apply.

Affleck's situation presents a wholly uncompelling argument given that she is in the United States pursuant to a spousal L-2 visa. Again, preemption is not applicable.

Takahaski v. Fish & Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948), does not compel a different result. *Takahashi* invalidated on preemption grounds a

provision of California law that banned the issuance of fishing licenses to "any person ineligible to citizenship." Takahashi was a resident alien[25] who had earned a living as a fisherman for nearly thirty years when California sought to exclude all aliens from obtaining fishing licenses. The Court began its analysis by explaining the vast differences in the ability of the federal and state governments to regulate alien activities — a principle that is now well-established in the law. *See* note 22 *supra*. In striking the California statute, the Court concluded that the state's attempt to prevent lawful aliens from earning a living was tantamount to expelling them because an alien cannot live where he cannot work.[26] *Id.* at 416-19, 68 S.Ct. at 1141-42 (quoting *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915)).

In contrast, Rule XVII does not affect aliens who permanently reside in the United States. Rather, Rule XVII affects temporary aliens who are not in this country to pursue long term, life sustaining employment. Plaintiffs are permitted to earn a living; however, they cannot represent litigants as licensed attorneys at law. The concerns at issue in *Takahashi* are simply not present in this case.

Accordingly, Plaintiffs motion for summary judgment is DENIED on the preemption issues.

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[25] At oral argument, Affleck asserted that Takahashi was a non-immigrant alien. The case is silent as to Takahashi's status but the Supreme Court mentioned in the opinion that Takahashi became a resident of California in 1907. The *Takahashi* decision was rendered in 1948. The Court seriously doubts that Takahashi was a non-immigrant alien.

[26] *Takahashi* was also decided against the backdrop of racial discrimination targeted at persons of Japanese ancestry during and after World War II.

D. Affleck's NAFTA Claim

Affleck asserts that she is in a special category of non-immigrant aliens in that she is a professional certified by a member of the Northern American Free Trade Agreement ("NAFTA"). Affleck asserts that Article 1202 of NAFTA requires that "service providers" be treated in a manner "no less favorable than the treatment of local service providers "in the same circumstances." She asserts that Defendants' actions are a clear breach of that mandate. She argues that the spirit of NAFTA clearly directs the destruction of barriers to attorneys working in member states. Therefore, under the Supremacy Clause, Louisiana cannot make laws contrary to NAFTA.

In opposition, Defendants argue that Affleck's NAFTA claims are procedurally defective. NAFTA gives Affleck no private right of action against Defendants to force compliance with NAFTA. Defendants assert that NAFTA provides for enforcement by the Secretary of State and the Attorney General of the United States. Thus, Affleck lacks standing. Further, Affleck offers no support for her implicit assertion that NAFTA preempts the Eleventh Amendment or that NAFTA was meant to preempt well-established state authority over licensing of attorneys.

On December 17, 1992, the leaders of the United States, Mexico, and Canada completed and signed NAFTA. *Made in the USA Foundation v. United States of America*, 242 F.3d 1300, 1302-03 (11th Cir. 2001). On December 8, 1993, Congress passed the NAFTA Implementation Act which approved NAFTA and provided a series of domestic laws to effectuate and enforce NAFTA's provisions. *See* Pub.L. No. 103-182, 107 Stat.2057 (1993), codified at 19 U.S.C. §§ 3301-3473.

Section 102 of the Implementation Act is entitled "Relationship of the Agreement to the United States and State

Law." Section 102(b) ("Relationship of the Agreement to State law"), subpart (2) ("Legal Challenge"), provides:

> No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, ***except in an action brought by the United States*** for the purpose of declaring such law or application invalid.

19 U.S.C. § 3312(b)(2) (emphasis added).

Furthermore, subsection (c) ("Effect of the Agreement With Respect to Private Remedies"), provides:

> ***No person other than the United States —***
>
> (1) shall have any cause of action or defense under —
>
> (A) the Agreement or by virtue of Congressional approval thereof, or
>
> * * * * * *
>
> (2) may challenge, in any action brought under any provision of law, any action or inaction by . . . any State . . . on the ground that such action or inaction is inconsistent with the Agreement ....

19 U.S.C. § 3312(c) (emphasis added).

In light of the foregoing provisions of the NAFTA Implementation Act, the Court concludes that Affleck lacks standing to challenge Rule XVII based upon any purported conflict with NAFTA. Affleck's claim is an attempt to invalidate a state law due to its inconsistency with NAFTA. NAFTA's enabling legislation expressly limits such a legal challenge to the United States. The Enabling legislation compels the conclusion that Affleck lacks standing to challenge Rule XVII based upon any purported conflict with

NAFTA. Defendants' motion to dismiss is GRANTED with respect to Affleck's NAFTA claim.

Accordingly;

IT IS ORDERED that Defendants Motion to Dismiss (Rec. Doc. 18) should be and is hereby DENIED IN PART AND GRANTED IN PART as detailed in this Order and Reasons;

IT IS FURTHER ORDERED THAT the Motion for Summary Judgment (Rec.Doc. 12) filed by plaintiffs Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck should be and is hereby DENIED and Plaintiffs' complaint is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiffs' Appeal of the Order of the Magistrate Judge Granting a Protective Order and Staying All Discovery (Rec.Doc. 25) should be and is hereby DENIED AS MOOT.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Karen Leclerc; Guillaume Jarry;
Beatrice Boulord; Maureen D. Affleck,
Plaintiffs - Appellants - Cross Appellees,

v.

Daniel E. Webb, et al.
Defendants

Daniel E. Webb; Harry J. Phillips, In Their Respective Official Capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions; Jeffrey P. Victory; Jeannette Theriot Knoll; Chet D. Traylor; Catherine D. Kimball, a/k/a Kitty Kimball; John L. Weimer; Bernette Joshua Johnson, In Their Official Capacities as Justices of the Louisiana Supreme Court,
Defendants - Appellees - Cross Appellants.

Docket No. 03-30752

Caroline Wallace; Emily Maw,
Plaintiffs - Appellees,

v.

Pascal F. Calogero Jr., in his official capacity as Chief Justice of the Louisiana Supreme Court; Jeffrey P. Victory; Jeannette Theriot Knoll; Chet D. Traylor; Catherine D. Kimball; John L. Weimer; Bernette J. Johnson, in their official capacities as Justices of the Louisiana Supreme Court; Daniel E. Webb; Harry J. Phillips, Jr., in their

respective official capacities as Chairman and
Vice-Chairman of the Louisiana Committee on Bar
Admissions,
Defendants - Appellants

Docket No. 03-31009

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC
(Opinion 8/18/05, 5th Cir.)

[Filed March 27, 2006]

Before JONES, Chief Judge, and SMITH, and STEWART, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and who are not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, joined by KING, DAVIS, WIENER, BENAVIDES, STEWART, and DENNIS, Circuit Judges, dissenting from the denial of rehearing en banc.

I respectfully dissent from the Court's refusal to consider en banc the important issues in this case. The panel majority rejects strict scrutiny on the basis that these "nonimmigrant aliens," whatever that means, are not as "discrete and insular" as the "permanent resident aliens" afforded suspect classification by the Supreme Court. It reaches that result by

judicially crafting a subset of aliens, scaled by how it perceives the aliens' proximity to citizenship. This is a bold step not sanctioned by Supreme Court precedent.

For decades, many have argued that it is the classification of aliens as an insular minority that is suspect. The criticism comes in two forms. To some, the unique federal interest in regulating aliens offers a superior rationale for strict scrutiny than the aliens' insular status. As the Supreme Court has recognized, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal government."[1]

To others, the insular status of aliens exists only as a consequence of valid federal law, making strict scrutiny of alienage classifications never appropriate. The contention strikes twice. First, it contends that the alien's limited political role cannot support their treatment as an insular minority. This, because the very admission of the alien is by legislation that defines his role in the political community, subject only to constitutional constraints upon the exercise of that federal power. Second and relatedly, given the supreme federal regulatory power over matters of immigration, the status of persons admitted in conformity with federal law is by definition not immutable. To the point, this criticism is leveled at the claimed insular minority status of *all* aliens lawfully in the country. It draws no distinction between a particular alien's connection to citizenship or subsets of lawfully admitted persons. Rather, it rejects strict scrutiny without regard to the aliens' proximity to citizenship, the relevant factor for discrete and insular minority status under *Carolene Products*.

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[1] *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (holding that the Supreme Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders" and collecting cases to that effect).

Resting strict scrutiny on the insular minority status of legally admitted aliens has its weaknesses. But none support the panel opinion and, in any event, each has been rejected by the Supreme Court. As for the trumping constitutional power of the federal government in controlling the nation's borders, including matters of immigration and naturalization, an allocation that the Supreme Court has pointed to as itself demanding strict scrutiny of state regulations of persons whose presence in the country is lawful under federal law, the panel majority is silent — a silence made the more puzzling by its rationale that this "category" of alien has such a limited tenure in the United States under the conditions of federal law admitting them that their state regulation should not be subjected to strict scrutiny. This is exactly backwards. As the federal constraints are increased, the regulatory field for states is decreased.[2] As federal judicial draws distinctions between different classes of aliens, applying strict scrutiny to some and rational-basis review to others, it shifts responsibility over aliens from the Congress to the States. This is perverse. The panel majority relaxes scrutiny of state regulation of aliens as the federal regulation of them is increased. This is too ambitious for me.

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[2] *Mathews*, 426 U.S. at 81; *see also Graham v. Richardson*, 403 U.S. 365, 378 (1971) ("[States] . . . can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States. . . . State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been more invalid." (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 417 (1948))).

CARL E. STEWART, Circuit Judge, with whom KING, HIGGINBOTHAM, WIENER and DENNIS, Circuit Judges, join dissenting from the denial of rehearing en banc.

I dissent from the court's denial of rehearing en banc in this case involving the rights of alien law school graduates to be admitted to practice law in the State of Louisiana. For the reasons more fully detailed in my dissenting opinion from the panel majority's holding,[1] I reject the panel majority's creation of a new classification of "nonimmigrant aliens," a distinction the Supreme Court has never drawn when discussing the alien suspect class, and its application of rational basis review to laws targeting this class. The matter at issue is clearly enbancworthy because of the far reaching consequences of the panel's holding. I continue to maintain that the plaintiffs in this case, who are lawfully admitted aliens residing in the United States, are part of the alien suspect class and that, therefore, laws that discriminate against them are inherently suspect and should be subjected to strict scrutiny. Accordingly, I dissent from the full court's failure to vacate the panel opinion and hear the case anew. Moreover, I fully concur in the persuasive opinion dissenting from the denial of rehearing en banc penned by Judge Higginbotham.

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[1] *LeClerc v. Webb*, 419 F.3d 405, 426-31 (Stewart, J., concurring in part and dissenting in part).

Supreme Court, U.S.
FILED
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No. 05-1645 *vide* 06-11

IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,

Petitioners

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, Petitioners Caroline Wallace and Emily Maw submit this supplemental brief to respond to the Brief for the United States as *Amicus Curiae*. The government does not dispute that there is a conflict between the decision below and that of a state court of last resort, *Dingemans v. Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989), on the important issue of the preemptive effect of the Immigration and Nationality Act on state licensing regimes that discriminate against aliens. Amicus Br. at 7, 13-14. Instead, the government offers an assessment of the merits of the conflict that rests on an illogical premise and on a misinterpretation of this Court's decision in *Toll v. Moreno*, 458 U.S. 1 (1982).

The government also cannot refute that a conflict exists between the decision below and *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981) concerning the proper level of equal protection scrutiny to apply to state laws that discriminate against subclasses of aliens. Instead, the government relies on cases addressing issues *not* presented here: the *federal* government's authority to discriminate among aliens and the "political functions" exception to strict scrutiny.

There are real conflicts in the law regarding important issues of federal preemption and equal protection scrutiny. The Court should grant the petition for a writ of certiorari to address and resolve these conflicts.

I. The Court Should Resolve the Preemption Conflict.

The government does not dispute that there is a conflict with *Dingemans* on whether the Immigration and Nationality Act preempts state laws that prohibit holders of H-1B visas from becoming state bar members solely on the basis of their status as aliens. Instead, the government argues that the conflict should be ignored because the Supreme Court of Vermont "did not have the benefit of DHS's views in resolving the preemption question," and DHS is said to "interpret[] the federal scheme to allow each State to decide the extent to which" H-1B visaholders "will be eligible for bar membership." Amicus Br. at 12, 14. The argument is meritless.

In the first place, DHS has no apparent jurisdiction to confer on States an authority to discriminate against aliens or subclasses of aliens, and thus any pronouncements by it on this subject are not entitled to deference. The timing of DHS's interpretation also strips it of any deferential respect. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (agency arguments advanced for the first time in litigation engender "near indifference"). *Cf. Medtronic v. Lohr*, 518 U.S. 470, 512 (2000) ("It is not certain that an agency regulation determining the preemptive effect of *any* federal statute is entitled to deference.") (O'Connor, J., concurring in part, dissenting in part).

Second, the asserted position of DHS is extreme and illogical. The government claims that since a state license is a precondition for an H-1B visa, Congress left to the States the right to preclude aliens from becoming eligible for licenses solely on the basis of their alien status. *See id.* at 8. Apparently, DHS would see no preemption problem if all 50 states decided not to allow any aliens to have licenses for any specialty occupations, notwithstanding that the Immigration and Nationality Act expressly provides for the admittance of aliens in such fields. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(B).

But why would a federal statute provide for visas that would never issue if States could prohibit persons from applying based solely on their status as aliens? It is absurd to interpret the federal statute that permits aliens to work as lawyers (or other licensed professions) as allowing the States to veto that decision by denying aliens the ability to seek a license in the first instance, solely on account of their alien status. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Congress cannot delegate to the States its plenary authority over immigration matters, U.S. Const. art. I, § 8, yet DHS's interpretation of the Act would make the States the decisionmakers on whether any H-1B visas can issue. The Supreme Court of Vermont's correct interpretation in *Dingemans* recognizes the federal preemption in this field. While States are free to set qualifications for licensure,[1] *Dingemans* simply holds that in doing so States cannot impose special burdens that would apply only to aliens because such barriers were not anticipated or contemplated by Congress in authorizing the admittance of aliens to practice in these fields. *See* 568 A.2d at 356.

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[1] The government argues that "Congress has not required States to make aliens eligible for a license so that they would then be eligible for H-1B status" and that Congress would not "seek to displace traditional state licensing authority." Amicus Br. at 9, 10. These statements misapprehend Petitioners' claim. Louisiana is not required to license Wallace or Maw to practice law because they are temporary visaholders; rather, Louisiana may not prevent them from becoming bar members solely because they happen to reside in the United States under a nonpermanent visa. Of course, in order to become bar members, Petitioners must meet the academic, character and fitness requirements set by the State. Thus, Maw has filed her equivalency paperwork and Wallace has taken and passed the Louisiana Bar exam.

A preemption holding would be consistent with the principles enunciated in *Toll*, which involved a state law that stood as an obstacle to the accomplishment of the full purposes and objectives of Congress as expressed in the Immigration Act's authorization of G-4 visas to World Bank employees. The Court held that the Act preempted Maryland's refusal to provide in-state tuition to the children of G-4 visaholders because this practice "frustrate[d] the federal policy" of admitting these aliens. 458 U.S. at 16. The Court held: "we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification." *Id.* at 17. So too here: in authorizing H-1B visas, Congress could not have contemplated that States could render the availability of such visas illusory by refusing to let aliens apply for necessary licenses solely because they are aliens.

The government argues that the state law in *Toll* "directly conflicted with congressional judgments relating to the G-4 classification." Amicus Br. at 11. Petitioners agree. But the conflict in *Toll*—depriving the children of lawfully-admitted aliens the benefit of in-state tuition on account of their status as aliens—is no less "direct" than the conflict here. Federal law permits aliens to enter the country on nonpermanent visas to practice as lawyers; Louisiana would prohibit those visas from ever issuing "solely on the basis of the federal immigration classification." If anything, the conflict here is more "direct" than in *Toll*: Congress said nothing about in-state tuition, but it has spoken expressly regarding the practice of law by H-1B visaholders.

The state law here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *De Canas v. Bicas*, 424 U.S. 351, 363 (1976) and imposes a "discriminatory burden[] upon the entrance or residence of aliens lawfully within the United States," *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948). It is therefore preempted by federal law.

II. The Court Should Resolve the Equal Protection Conflict.

The government does not refute Petitioners' showing that a conflict exists between the Fourth Circuit's decision in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981) and the decision of the Fifth Circuit in this case. Instead, the government argues that "it is unclear" whether the Fourth Circuit would consider itself "entirely bound" by its prior decision and then attempts to distinguish *Moreno* on the basis of the particular immigration classification at issue. *See* Amicus Br. at 19. Neither point has merit.

The Fourth Circuit cannot overrule a prior decision absent an en banc ruling or intervening Supreme Court precedent. *See McMellon v. United States*, 387 F.3d 329, 331-32 (4th Cir, 2004). *Moreno*'s adoption of the district court's application of strict scrutiny remains the law of the Fourth Circuit with respect to state law subclassifications based on alienage. *See* 645 F.2d at 220.

The government's attempt to distinguish *Moreno* because it involved G-4 visaholders as opposed to H-1B visaholders lacks merit. *See* Amicus Br. at 19. A classification is based on alienage regardless of how many or how few aliens fall within its scope. *See Nyquist v. Mauclet*, 432 U.S. 1, 19 (1977) ("The important points are that [the State law] is directed at aliens and only aliens are harmed by it."). An H-1B visaholder is not situated differently from a G-4 visaholder in terms of the "myriad other ways" each contributes to our society. *In re Griffiths*, 413 U.S. 717, 722 (1973). An H-1B visaholder can have "dual intent" and may seek permanent residence in the United States. *See* 22 C.F.R. § 41.11; 8 C.F.R. § 214.2(h)(16). And H-1B visaholders, unlike G-4 holders, pay federal and state income taxes. *See* 26 U.S.C. § 7701(b). There is no reason why the equal protection analysis should be less strict for the H-1B visaholders.

The government also argues that *Foley v. Connelie*, 435 U.S. 291 (1978) and *Mathews v. Diaz*, 426 U.S. 67 (1976) establish that strict scrutiny does not apply to all classifications based on alienage. *See* Amicus Br. at 15-16. But neither *Foley* nor *Mathews* is applicable here. This case does not involve a state law restricting employment in a political function, such as a police officer or government official; there is no reason to invoke the *Foley* exception to strict scrutiny.

This case also does not involve a challenge to a *federal* statute that discriminates on the basis of alienage, so reliance on *Mathews* is misplaced. The situation here involves a *State* depriving lawfully-admitted aliens of the equal protection of its laws, and the government can point to no authority other than the incorrect decision below that requires rational basis review in such circumstances.[2] The argument that the State's action has been "incorporated" into federal law (Amicus Br. at 18) and therefore is not subject to strict scrutiny is unsupported by any citations and is at odds with the undeniable fact that the discriminatory action in this case is solely that of the State of Louisiana, in which the federal government played no role at all.

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[2] The government argues that strict scrutiny is not appropriate because aliens residing abroad have "no ties to this country and no claim to equal treatment." Amicus Br. at 17. That statement is beside the point. Petitioners reside lawfully within the United States. The Fourteenth Amendment prohibits Louisiana from denying them "the equal protection of the laws." U.S. Const. amend XIV.

CONCLUSION

The petition for a writ of certiorari should be granted.

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(7)

No. 06-11

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KAREN LECLERC, ET AL.,

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v.

DANIEL E. WEBB, ET AL.,

Respondents.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief responds to the Brief for the United States as Amicus Curiae. The government's reasons for recommending that the petition be denied are without merit.

1. The question at issue is whether a state should be permitted—without close judicial scrutiny—to prevent a class of aliens, whom the federal government has authorized to live and work in the United States, from engaging in their chosen profession based solely on their immigration status. The United States (at 8-10) says yes because Congress provided that aliens seeking H-1B status are not exempt from state licensing requirements otherwise applicable to a particular occupation. See 8 U.S.C. § 1184(i)(2)(A). But it takes an unwarranted leap of logic to conclude, as the government does, that Congress intended to permit states to deny the necessary license to otherwise qualified persons based solely on the applicant's federal immigration status.

A state undoubtedly may require an alien who seeks to practice as an attorney to pass a bar exam and to satisfy educational and ethical requirements. But unless it can demonstrate a compelling need, a state should not be permitted to preclude an alien who satisfies all such requirements from practicing law based solely on the very federal immigration classification that permits the alien to live and work in that state. Otherwise, a state could too readily undermine the federal policy that allows such aliens to work and reside in the United States, and there would be little or no effective check on the exercise of the type of discrimination to which foreign nationals historically have been subject. The government's view would leave "no limit

to the State's power of excluding aliens from employment." *Truax* v. *Raich*, 239 U.S. 33, 42-43 (1915).[1]

2. The government's misconstruction of Congressional intent with regard to state licensing leads it to deny that the Fifth Circuit's ruling conflicts with *Toll* v. *Moreno*, 458 U.S. 1 (1982). In *Toll*, this Court held that federal immigration law preempted a state's imposition of "discriminatory" tuition charges "solely on account of the federal immigration classification." *Id.* at 17. The only distinction offered by the government from this case, that the visa classification at issue in *Toll* did not require a state license, again improperly assumes that the right of states to condition licenses on specified qualifications makes discrimination against lawful aliens an allowable condition. Like Maryland in *Toll*, Louisiana has imposed on nonimmigrant aliens "an ancillary 'burden not contemplated by Congress' in admitting these aliens to the United States." *Id.* at 14. That is, Louisiana is denying petitioners a license to practice law solely *because of their lawful immigration status*, not because they do not satisfy the licensing requirements applied to every other person. There is nothing to indicate that Congress intended to authorize such discriminatory treatment.

3. The government acknowledges (at 13) that the Fifth Circuit's decision directly conflicts with *Dingemans* v. *Board of Examiners*, 568 A.2d 354 (Vt. 1989), in which the Vermont Supreme Court held that states inevitably obstruct federal immigration law if they prevent otherwise qualified nonimmigrant aliens from Bar admission. See Pet. 11. The

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[1] The DHS regulation relied on by the government (at 9) actually reinforces the conclusion that Congress did not authorize states to create special licensing prohibitions for aliens seeking H-1B status. The regulation provides that a State exemption that allows an individual to engage in an occupation under supervision in lieu of the otherwise required license must encompass nonimmigrant aliens seeking H-1B status. 8 C.F.R. § 214.2(h)(4)(v)(C).

government's conclusion (at 14) that the *Dingemans* decision was "incorrect" does not obviate that conflict. Nor is it true that this conflict has no material "impact," as the government suggests (*ibid.*). Today, legislators and licensing officials in Vermont cannot prevent nonimmigrant aliens from practicing law, whereas agency officials in Louisiana, Texas, and Mississippi are free to do so. Allowing the same federal visa status to affect persons with identical qualifications depending on the state in which they happen to reside is an untenable situation that warrants this Court's intervention.

The government suggests (at 14) that the impact of the *Dingemans* decision is no different than if the Vermont Supreme Court had "interpret[ed] a rule to allow aliens who are not permanent residents to obtain a license to practice law, which it could have done." But the fact that a state court "might have, but did not, invoke state law does not foreclose" this Court's jurisdiction. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). Unlike a state court's independent construction of a state statute, a state court's judgment that a state statute violates the federal Constitution is appropriately reviewed by this Court. "[I]f the state court erred in its understanding of our cases and of the [federal Constitution], we should so declare." *Ibid.*; see also *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983).

4. The United States offers no viable reason why *In re Griffiths*, 413 U.S. 717, 722 (1973), which found it "appropriate that a State bear a heavy burden when it deprives [resident aliens] of employment opportunities," in particular admission to the state Bar, does not govern this case. The government (at 15-16) relies on the fact that the plaintiff in *Griffiths* was a permanent resident alien. But this Court said not a word in *Griffiths* to indicate that the permanency of her residence was a factor in its decision. The government (at 16) also references an exception to strict scrutiny for certain governmental policymaking positions, but it omits the fact that this Court held in *Griffiths* that this

exception does not apply to lawyers or to bar admission restrictions. 413 U.S. at 728. The government gains no support from its citation to *Mathews* v. *Diaz*, 426 U.S. 67, 85 (1976), which held that alienage classification by the *federal* government are subject to rational basis review, and recognized that, in contrast, such classifications by the *states* must satisfy strict scrutiny.

5. The government suggests (at 17) that nonimmigrant aliens have a reduced "claim to equal treatment" because they "do not ordinarily have the same ties to this country as permanent residents." But the touchstone for applying strict scrutiny to state alienage classifications is that such classifications are "inherently suspect" because aliens are a "prime example of a 'discrete and insular' minority." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). "[P]rejudice against discrete and insular minorities" is a "special condition" that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). It cannot be seriously maintained that aliens who reside here for three or six or ten years (see Pet. 17) are materially less subject to such prejudice. Moreover, many aliens on such long-term visas obviously do develop significant ties to this country, and thus the government's "significant ties" argument cannot rescue Louisiana's unqualified ban on their practicing law from the strict scrutiny to which such discrimination is subject under this Court's precedents.

6. The government seizes on the absolutism of Louisiana's ban on the practice of law by nonimmigrant aliens to support its view that strict scrutiny is inappropriate. It argues (at 17-18) that, because Section 3(B) also affects aliens "who apply from abroad for visas," it affects persons who "have no ties to this country." That may be, but the impact on persons living abroad is not the issue. Petitioners all resided in Louisiana at the time they sought to be admitted

to the state Bar. It is the differential impact of Section 3(B) on these state residents, who otherwise meet all state qualifications for Bar membership, that implicates the Equal Protection Clause and requires strict scrutiny.

7. The government is wrong to deny (at 18-19) that the Fifth Circuit's ruling conflicts with the Fourth Circuit's ruling in *Moreno* v. *University of Maryland*, 645 F.2d 217 (4th Cir. 1981), aff'd on other grounds, *Toll* v. *Moreno*, 458 U.S. 1 (1982). In *Moreno*, the Fourth Circuit affirmed the district court's ruling that state classifications that burden only nonimmigrant aliens are subject to strict scrutiny. *Id.* at 220. The government has no support for its suggestion (at 19) that the Fourth Circuit might not "feel entirely bound by its affirmance" and failed to "conduct its own independent constitutional analysis." The Fourth Circuit did conduct its own independent analysis, concluding that the district court's analysis was correct and that there was therefore no reason to re-plough the same ground. Moreover, the equal protection ruling in *Toll* remains the law in the Fourth Circuit, which follows the rule that "[a] decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court." *Etheridge* v. *Norfolk & W. Ry.*, 9 F.3d 1087, 1090 (4th Cir. 1993).

The United States notes (at 19) that the G-4 visa classification at issue in *Moreno* is "not at issue here." But *Moreno*'s equal protection analysis did not turn on that particular nonimmigrant alien classification. The district court held that *all* aliens who "maintain their place of general abode within the United States," including "immigrant and nonimmigrant," are "wrapped [in] the suspect classification blanket" and entitled to strict scrutiny (*Moreno* v. *Toll*, 489 F. Supp. 658, 663-664 (D. Md. 1980)), and the Fourth Circuit adopted the "reasons sufficiently stated in the opinion of the district court." *Moreno*, 645 F.2d at 220.

8. Finally, we note that the government does not comment on the impact of upholding the Louisiana rule on the transnational practice of law. See Pet. 22-24; Br. Amicus Curiae of Tulane University School of Law; Br. Amicus Curiae of Coalition of Service Industries. Allowing individual states to shun lawyers from foreign countries who are otherwise eligible to practice here sends the wrong message—or at least sends a message that should be composed only by the federal government—and can only hamper the more open exchange of services that the United States and its trading partners are attempting to negotiate under the General Agreement on Trade in Services.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents offer no valid reason why this Court should not review the questions presented.

I. The Court Should Review The Fifth Circuit's Equal Protection Ruling.

1. Petitioners do not contend that all nonimmigrants are "entitled to the same treatment" as citizens and immigrants, as respondents assert (at 18). Instead, petitioners challenge a state's exclusion of all nonimmigrant aliens from the practice of law. As the petition explains (at 12-17), such a categorical ban is an alienage classification subject to strict scrutiny.

Respondents fail to acknowledge the breadth of § 3(B). It categorically excludes *all* nonimmigrant aliens from Bar admission, including those satisfying Louisiana's eligibility criteria. Thus, § 3(B) excludes not only lawyers educated abroad but also foreign nationals with JD degrees from ABA-accredited law schools in the U.S., such as *Wallace* petitioner Emily Maw, who received a JD from Tulane University.

2. The Fifth Circuit's rejection of strict scrutiny conflicts with the Fourth Circuit's ruling in *Moreno* (see Pet. 10). Respondents (at 15) seek to deny that conflict by pointing to the Fourth Circuit's recognition of differences between the G-4 visas at issue in *Moreno* and other nonimmigrant visas. But those differences played no role in the Fourth Circuit's equal protection analysis, which it adopted from the district court. After thoroughly analyzing the issue, the district court held that all aliens who "maintain their place of general abode within the United States," including "immigrant and nonimmigrant," are "wrapped [in] the suspect classification blanket" and entitled to strict scrutiny. *Moreno* v. *Toll*, 489 F. Supp. 658, 663-664 (D. Md. 1980). The Fifth Circuit's rejection of strict scrutiny in this case conflicts with the Fourth Circuit adoption of that analysis, which this Court did not disturb in affirming on preemption grounds. Furthermore,

G-4 visa holders, as nonimmigrant aliens, fall within the exclusionary scope of § 3(B) just as petitioners do.

3. Respondents (at 12) deny that this Court's alienage precedents require strict scrutiny of state discrimination *among* aliens as opposed to discrimination *against* aliens in favor of citizens. Respondents disregard the Court's express rejection, in *Nyquist*, 432 U.S. at 8, of the notion that a state could circumvent those strict scrutiny precedents merely by "distinguish[ing] only within the heterogeneous class of aliens" and "not * * * between citizens and aliens *vel non*."

4. Respondents (at 12) also reject strict scrutiny on the ground that nonimmigrant aliens are not a suspect class. They cite no authority for that proposition other than (at 12) a 1923 decision that preceded by decades the Court's adoption of the strict scrutiny standard for state alienage classifications. Since adopting that standard, the Court repeatedly has reaffirmed that courts must strictly scrutinize state alienage classifications (see Pet. 12), including those governing Bar admission requirements. See *Griffiths*, 413 U.S. at 721. As the petition demonstrates (at 12-13), none of this Court's precedents requiring strict scrutiny of alienage classifications rests on a distinction between immigrant and nonimmigrant aliens. Respondents (at 14) attempt to distinguish *Griffiths* on the ground that the Bar admission rule struck down in that case "totally excluded" all aliens from Bar admission. Yes, and § 3(B) "totally excludes" all nonimmigrant aliens from Bar admission. As in *Griffiths*, that categorical exclusion should be closely scrutinized to ensure that it is narrowly tailored to serve a compelling state interest.

To be sure, the Court has not directly addressed whether a state may ban nonimmigrant aliens from Bar admission. If it had, the circuits would not be in conflict over that question, the district courts in *Leclerc* and *Wallace* would not have reached opposite conclusions, the Fifth Circuit panel would

not have divided 2-1, and there would not have been an 8-7 split over whether to grant rehearing en banc.

5. Respondents (at 7-8) also rely on supposed differences between immigrant and nonimmigrant aliens to support their call for a lesser standard. None overcomes the rationale for strict scrutiny—the history of discrimination suffered by aliens and their inability to resist it by exercising the vote. See Pet. 15-16. Moreover, the purported differences are nonexistent or immaterial. For example, respondents contend (at 7-8) that nonimmigrant aliens "do not pay taxes like citizens" or immigrant aliens. But their own footnote (Br. 8 n.16) shows that all nonimmigrant aliens pay taxes on income earned in the U.S. just as citizens and immigrants do, and in fact many nonimmigrants, including petitioners, pay U.S. taxes on income earned outside the U.S. as well.

6. Respondents suggest (at 7-10) that governmental discrimination against nonimmigrant aliens is too common to warrant strict scrutiny. But their citations do not support that thesis. They cite (at 9 n.25) New York and Colorado cases for their assertion that some states categorically deny unemployment benefits to nonimmigrant aliens. But the New York court held only that one applicant's immigration status "legally barred [him] from working in the United States" and thus made him "ineligible for benefits." *Zapata*, 50 A.D.2d at 682. And the issue before the Colorado court was "whether an *illegal alien* is entitled to unemployment compensation benefits." *Duenas-Rodriguez*, 606 P.2d at 439 (emphasis added). Respondents' reliance (at 9) on *Carlson* v. *Reed*, 249 F.3d 876 (9th Cir. 2001), also is unavailing. *Carlson* held that *some* nonimmigrant visa holders cannot qualify for domicile under California law, but it recognized that other nonimmigrant visa holders may do so and thereby become eligible for tuition benefits. *Id.* at 878-883. These cases say nothing about the constitutionality of denying benefits to nonimmigrant aliens as a class.

Respondents (at 17 n.46) cite only one case for their assertion that some states deny welfare benefits to nonimmigrant aliens. But *Soskin* v. *Reinertson*, 353 F.3d 1242, 1257 (10th Cir. 2004), actually shows why the proper level of scrutiny needs to be clarified. In *Soskin*, the Tenth Circuit held, over a strong dissent, that a state's removal of nonimmigrant alien Medicaid benefits, pursuant to a federal statute giving states discretion over alien qualifications for such benefits, was subject only to rational basis scrutiny. In doing so, the Tenth Circuit expressly disagreed with the New York Court of Appeals which had held, in upholding an equal protection challenge under the U.S. Constitution, that a state's removal of nonimmigrant alien Medicaid benefits was subject to strict scrutiny. *Id.* at 1252-1256 (rejecting *Aliessa* v. *Novello*, 754 N.E.2d 1085 (N.Y. 2001)). This conflict underscores the need for the Court's guidance on the proper level of scrutiny when states discriminate against nonimmigrant aliens.

Respondents also observe (at 9-10) that some states deny visa holders the right to practice medicine and dentistry. But they cite no decision from this Court upholding such classifications, and the New York statute they cite authorizes the ban to be waived for up to nine years based on individual factors (unlike the absolute ban of § 3(B)). N.Y. Educ. Law § 6524(6). Respondents further rely on Iowa's ban on agricultural property ownership by nonimmigrants. But no court has determined whether that restriction is subject to strict or rational basis scrutiny. See Iowa Code Ann. § 9I.3. Moreover, this Court has questioned (without deciding) the validity of state laws barring aliens from owning land. See *Takahashi*, 334 U.S. at 422 (citing *Oyama* v. *California*, 332 U.S. 633 (1948)). Respondents' reliance on such state laws, which arose due to "xenophobic" hostility directed at particular nationalities (Keith Aoki, *No Right to Own: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37, 40 (1998)), highlights why

the Court should revisit the constitutional limits on a state's power to deny benefits to broad categories of lawfully admitted aliens.

Respondents (at 8) try to support their argument by pointing to *federal* alienage provisions. But it is well settled that federal—unlike state—alienage classifications are subject only to rational basis scrutiny. *Mathews*, 426 U.S. at 85. Respondents' confusion on this point is exemplified by their reliance (at 10) on *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). *Landon* addressed only the power of Congress—not the states—to distinguish among aliens. Respondents' claim that states are authorized by 8 U.S.C. §§ 1621-1622 to decide alien eligibility for public benefits fails to note that § 1621(c)(2) expressly *excludes* a "professional license" issued to various classes of nonimmigrant aliens from the definition of "State or local public benefit."

7. Respondents do not contend that § 3(B) satisfies strict scrutiny. Nor could they plausibly do so. States have no compelling reason to forbid *all* otherwise qualified non-immigrant aliens from practicing law. Respondents, in arguing (at 21-23) that the Louisiana rule is rational, identify only one purported state interest: preventing nonimmigrant alien lawyers from abandoning the U.S. and thereby leaving their clients in the lurch and the Louisiana Supreme Court to pick up the pieces. Such a concern might be valid if § 3(B) applied solely to 60-day tourist visas, but no one is seeking to have tourists practice law. As the petition explained (at 17), many categories of non-immigrant visas authorize stays of three, ten, or more years. Those are not short-term stays but durations comparable in length to the practices of many citizen and immigrant lawyers in a particular jurisdiction.

Louisiana does not condition a citizen's or immigrant alien's Bar admission on a commitment to practice for decades in-state. Citizens and immigrant aliens may (and frequently do) leave the state, leave the country, die

suddenly, change professions, stop working to raise a family, or otherwise cease practicing law in-state shortly after being admitted to the Bar. States presume that attorneys will practice ethically and not simply abandon their clients if they leave the jurisdiction or cease practicing law. Nonimmigrant alien attorneys as a class possess no "distinguishing characteristics" (Br. 19) that would rebut that assumption and justify a state's categorical ban on their practicing law. Of course, a particular nonimmigrant alien may be unsuitable for Bar admission. But the same is true of citizens and immigrant aliens, and Louisiana (like all other states) has appropriate screening devices to protect the integrity of the legal profession and ensure proper client representation. Respondents do not suggest that, prior to adopting its new construction of § 3(B) in 2002, Louisiana experienced any client representation or discipline problems associated with nonimmigrant alien lawyers.

Even if any concerns about the suitability of some nonimmigrant aliens to practice law were valid, § 3(B) prevents consideration of particular factors that may weigh in favor of admission. Louisiana's Bar authorities retain no means to make an informed judgment about whether a particular nonimmigrant applicant is likely to pass through the state quickly or instead practice in-state for an extended time. See *Griffiths*, 413 U.S. at 725 (states retain "wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law"). For example, any accountability concerns should be reduced if an applicant has an offer from an established law firm. The categorical nature of § 3(B) is what makes this case an ideal vehicle for clarifying the proper level of scrutiny.

8. The fact that other states have not adopted such a categorical ban undermines respondents' attempt to portray nonimmigrant attorney transiency as a serious problem. They contend without citation (at 12 n.35) that Rhode Island similarly bars nonimmigrant aliens from the practice of law.

In fact, Rhode Island requires only that a Bar applicant be "a citizen of the United States or legal resident,"[1] with no suggestion that nonimmigrant aliens legally residing in the U.S. are not "legal residents." Respondents also note (*ibid.*) that "New Hampshire limits bar admission to 'domiciliaries of the United States.'" It is far from clear that this rule bans *all* nonimmigrant aliens from Bar membership—both H-1B and L visa holders may be domiciled in the U.S. pursuant to the "dual intent" doctrine (see Pet. 17) —but if it does, all the more reason why the Court should grant the petition.

To be sure, the states' Bar admission requirements exhibit considerable variety. "[T]he rules governing the practice rights of foreign lawyers in the U.S. are so varied, complex and opaque as to present a sticky web of barriers." Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 Nw. J. Int'l L. & Bus. 487, 509 (2003). Although only Louisiana now expressly excludes all nonimmigrant alien lawyers from its Bar, Vermont and Michigan did so in the recent past and there is a serious risk that other states will follow suit. Accordingly, resolving the proper level of scrutiny of a state's categorical exclusion of nonimmigrant aliens is urgently required.

II. The Court Should Review The Fifth Circuit's Preemption Ruling.

1. The preemption question presented does not challenge, as respondents assert (at 24), the states' authority over "attorney licensing, oversight and discipline." The issue is whether specific federal laws allowing certain nonimmigrant aliens to work in the U.S. restrict the states' reserved power to disqualify all nonimmigrant aliens from working as lawyers. As explained in *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941), a state's "power to restrict, limit, [and] regulate * * * aliens [is] subordinate to supreme national law."

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[1] http://www.courts.state.ri.us/Supreme/bar/bar-rules.pdf.

Contrary to respondents (at 26), no "substantial deference" is warranted here. "States enjoy no power with respect to the classification of aliens." *Plyler*, 457 U.S. at 225.

2. Respondents contend (at 26) that petitioners identify no "actual conflict" between § 3(B) and federal immigration law. That is not so. The petition (at 20-21) sets forth several direct conflicts. In addition, Department of Homeland Security regulations list numerous categories of aliens, including "nonimmigrant" aliens, who "are authorized to be employed in the United States *without restrictions as to location or type of employment* as a condition of their admission." 8 C.F.R. § 274a.12(a)(6), (9), (15), (16) (emphasis added). Yet, the Louisiana rule at issue expressly restricts the "type of employment" to which such nonimmigrant aliens are eligible. That is a direct conflict.

3. As the petition explains (at 11), the ruling below directly conflicts with the Vermont Supreme Court's holding in *Dingemans* that a state rule excluding Bar applicants "strictly on grounds [of] alien status" was preempted. Respondents do not mention *Dingemans*, nor *Andrade* (Pet. 11-12), which explained that a state's categorical exclusion of benefits to nonimmigrant aliens would be preempted by federal law. The ruling below also conflicts with *Rogers* v. *Larson*, 563 F.2d 617, 618-619, 622 (3d Cir. 1977), which held that a statute requiring "the replacement of alien nonimmigrant workers [with] United States citizens or permanent resident aliens," stood "as an obstacle to the execution" of federal immigration law and was therefore preempted.

4. Respondents (at 25-26) can obtain no support from the clear statement canon. Petitioners do not challenge Louisiana's regulatory authority over Bar admission and attorney conduct but rather the interference with federal immigration law caused by Louisiana's categorical exclusion of a class of persons that federal law authorizes to live and

work in the U.S. The *Toll* statement rule did not prevent this Court in *Toll* from holding a state education law preempted (see Pet. 19). Indeed, respondents disregard the conflict between *Toll* and the Fifth Circuit's decision in this case.

5. Respondents reliance (at 27-28) on *DeCanas*, which addressed a restriction on *illegal* aliens, is misplaced. Moreover, *DeCanas* made clear that "state regulation *not congressionally sanctioned* that discriminates against aliens *lawfully admitted* to the country is impermissible if it imposes *additional burdens* not contemplated by Congress." 424 U.S. at 358 (emphasis added). Congress has not sanctioned a state ban on nonimmigrant lawyers, and Louisiana may not sweepingly impose such additional burdens on this lawfully admitted class of aliens.

6. Respondents suggest (at 27) that nonimmigrant attorneys work as paralegals. But federal immigration law would be severely undermined if lawfully admitted persons qualified to practice as lawyers were forced to do subordinate work. The practice of law is one of the "common occupations of the community [that] is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax*, 239 U.S. at 41. States have no authority to deny "those lawfully admitted to the country under the authority of the acts of Congress * * * the privileges conferred by the admission." *Id.* at 42.

7. It is particularly important that the Court address the limits on state regulation of lawfully admitted aliens at a time when the federal government is strengthening its control over our borders (and non-citizens within those borders) and when the globalization of legal services is expanding rapidly. As Justice Jackson put it, treatment of aliens "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

Granting the petition would allow the Court to protect those policies from state measures like § 3(B).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW, PETITIONERS

v.

PASCAL F. CALOGERO, JR., CHIEF JUSTICE, SUPREME COURT OF LOUISIANA, ET AL.

KAREN LECLERC, ET AL., PETITIONERS

v.

DANIEL E. WEBB, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state bar rule that allows citizens and permanent resident aliens to become members of the bar, but that precludes aliens who are not permanent residents from becoming members, is preempted by federal immigration law.

2. Whether that state rule violates the Equal Protection Clause of the Fourteenth Amendment.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the decision below is correct and does not warrant the Court's review.

STATEMENT

1. The Immigration and Nationality Act distinguishes between immigrant and nonimmigrant aliens. Immigrant aliens have been "lawfully accorded the privilege of residing permanently in the United States," 8 U.S.C. 1101(20), and are not legally restricted in the activities they may pursue. Nonimmigrant aliens are granted temporary admission to the

United States for specific purposes. 8 U.S.C. 1101(a)(15) (2000 & Supp. IV 2004). Nonimmigrant aliens must abide by the conditions of their admission and stay as determined by the Secretary of Homeland Security. 8 U.S.C. 1184(a)(1); 8 C.F.R. 214.1(a)(3)(i).

a. An H-1B nonimmigrant is an alien who has come "temporarily" to the United States "to perform services" in, *inter alia*, a "specialty occupation." 8 U.S.C. 1101(a)(15)(H)(i)(B) (Supp. IV 2004). For an alien to obtain H-1B status, a prospective employer must file a petition with the Department of Homeland Security (DHS) on the alien's behalf. 8 C.F.R. 214.2(h)(1)(i) and (2). The application must establish that the alien possesses the minimum requirements necessary to be engaged in a speciality occupation and that the position the alien intends to fill is a speciality occupation. *Ibid.* The practice of law can qualify as a "specialty occupation." 8 C.F.R. 214.2(h)(4)(ii). If a state license is required to practice the speciality occupation, the alien must obtain such a license before seeking classification in that occupation. 8 U.S.C. 1184(i)(2)(A); 8 C.F.R. 214.2(h)(4)(v)(A). The petitioner must also obtain a certification from the Department of Labor on wages and working conditions, and that certification must be submitted together with an H-1B petition. 8 C.F.R. 214.2 (h)(4)(i)(B)(*2*).

If DHS approves the employer's petition, an alien may then apply for an H-1B visa. If the alien is abroad, that application may be made at the consular post. 8 C.F.R. 214.2(h)(2)(iv). The alien must satisfy the consular officer that he or she is admissible to this country and otherwise meets the requirements for the issuance of a visa. If issued an H-1B visa, the alien must then apply to DHS for admission at a port-of-entry, and DHS will then specify the terms and conditions of admission. *Ibid.* If the alien is already in the United States in a lawful nonimmigrant status, DHS "may,"

subject to certain exceptions, authorize a change from that nonimmigrant status to another, including H-1B status. 8 U.S.C. 1258; 8 C.F.R. Pt. 248.

An alien who has obtained H-1B status "may be employed only by the [employer] through whom the status was obtained." 8 C.F.R. 274a.12(b)(9). An approved H-1B petition may be valid for up to three years, 8 C.F.R. 214.2(h)(9)(iii)(A)(*1*). Ordinarily, an "alien's total period of stay may not exceed six years." 8 C.F.R. 214.2(h)(15)(ii)(B)(*1*).

b. The J-1 exchange visitor visa may be granted to an alien "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States as a participant in a program * * * for the purpose of," *inter alia*, "studying." 8 U.S.C. 1101(a)(15)(J). Aliens admitted to the United States in J-1 status may work only when such activities are part of the specific exchange program in which they are participating. 22 C.F.R. 62.16(a).

c. An L-1 nonimmigrant is an alien who has worked abroad "in a capacity that is managerial, executive, or involves specialized knowledge" and who has transferred temporarily to the United States to work in a similar capacity for the same employer or a qualifying subsidiary or affiliate. 8 U.S.C. 1101(a)(15)(L) (Supp. IV 2004). An employee who is transferred to work as a manager or executive may remain in the United States in L-1B status for a maximum of seven years, while an alien who is transferred to the United States to work in a specialized knowledge capacity may remain in the United States in L-1B status for a maximum of five years. 8 C.F.R. 214.2(*l*)(15)(ii). An alien who attains L-1 status "may be employed only by the [employer] through whom the status was obtained." 8 C.F.R. 274a.12(b)(12). An L-2 visa may be issued to the spouse or a child of a person who has attained L-1 status. 8 U.S.C. 1101(a)(15)(L) (Supp. IV 2004). Spouses and children who are admitted in L-2 status are "subject to the

same period of admission and limits" as the person in L-1 status. 8 C.F.R. 214.2(*l*)(7)(ii). "Neither the spouse nor any child may work unless he or she has been granted employment authorization." *Ibid.* The statute directs DHS to authorize the alien spouse to engage in employment in the United States and to issue the spouse an "appropriate work permit," 8 U.S.C. 1184(c)(2)(E) (Supp. IV 2004), but it does not require that the spouse be authorized to work in any particular occupation.

2. Supreme Court of Louisiana Rule XVII, Section 3(B) limits admission to the Louisiana Bar to citizens of the United States and resident aliens. For purposes of that rule, resident aliens include only aliens who have "permanent resident status in the United States." *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002). Nonimmigrant aliens therefore may not become members.

Petitioners are nonimmigrant aliens who want to be admitted to the Louisiana Bar, but are precluded from being admitted by Section 3(B). Pet. App. 3a, 7a.[1] Petitioners in No. 06-11 (the Leclerc petitioners) are Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck. *Id.* at 3a. Leclerc and Jarry are French citizens who were admitted to the United States in J-1 nonimmigrant status; Boulord is a French citizen who was admitted to the United States on a J-1 visa, but who now holds an H-1B visa; and Affleck is a Canadian citizen admitted to the United States as an L-2 spouse. *Id.* at 3a-4a; Pet. 5. All of the Leclerc petitioners hold degrees from foreign law schools. Pet. App. 4a.

In March 2003, the Leclerc petitioners filed suit in the United States District Court for the Eastern District of Louisiana, seeking a declaration that Section 3(B) is preempted by

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[1] Unless otherwise noted, all references to "Pet. App" are to the appendix to the petition in No. 06-11.

federal immigration law and violates the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 5a-6a. The district court rejected both claims. *Id.* at 6a.

Petitioners in No. 05-1645 (the Wallace petitioners) are Caroline Wallace and Emily Maw. Pet. App. 7a. They are British citizens who were admitted to the United States in H-1B nonimmigrant status. *Ibid.* Wallace is licensed as an attorney in England and Wales and is currently performing non-attorney legal work in the United States. *Ibid.* Maw holds a law degree from Tulane University and is performing paralegal work in the United States. *Ibid.*

In May 2005, the Wallace petitioners filed their own suit in the United States District Court for the Eastern District of Louisiana, raising the same preemption and Equal Protection challenges to Section 3(B) as the Leclerc petitioners. Pet. App. 8a. The district court rejected the preemption claim, but held that Section 3(B) violates the Equal Protection Clause. *Ibid.*

3. Appeals were taken in both cases. After consolidating the appeals, Pet. App. 8a, the court of appeals rejected petitioners' preemption and equal protection challenges to Section 3(B). *Id.* at 1a-42a.

The court of appeals first held that Section 3(B) is not subject to strict scrutiny. The court noted that this Court has applied strict scrutiny to state laws affecting "permanent resident aliens," but it has never applied strict scrutiny "to a state law affecting any other alienage classifications." Pet. App. 13a-14a. The court concluded that strict scrutiny applies to alienage classifications that affect permanent residents because such classifications are "seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*," *id.* at 15a (quoting *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978)), and because permanent resident aliens "are similarly situated to citizens in their economic, social and

civic (as opposed to political) conditions." *Id.* at 17a (footnote omitted). The court concluded that those rationales do not support application of strict scrutiny to classifications that apply only to aliens who do not have permanent status in the United States. *Id.* at 19a-21a.

Applying rational basis review, the court held that Section 3(B) is rationally related to the State's legitimate interest in ensuring that lawyers "provide continuity and accountability in legal representation." Pet. App. 23a. The court explained that the State's "ability to monitor, regulate, and, when necessary, discipline and sanction members of the Bar requires that it be able to locate lawyers under its jurisdiction," and that the State could rationally determine that "the easily terminable status of nonimmigrant aliens would impair these interests." *Id.* at 23a-24a. In particular, if a nonimmigrant alien chose to leave the country, "such an attorney would be utterly beyond the reach of the Louisiana Bar." *Id.* at 24a.

The court of appeals also held that Section 3(B) is not preempted by federal immigration law under *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982). Pet. App. 29a-31a. The court concluded that "Section 3(B) does not succumb to the *Toll* infirmity of proscribing by state law what Congress expressly permits by federal statute." *Id.* at 30a. The court explained that nonimmigrant aliens may obtain H-1B status to participate in certain legal activities without a license, *id.* at 31a, and federal law "does not itself mandate domestic professional licensing." *Id.* at 32a.

Judge Stewart dissented. Pet. App. 33a-42a. He agreed that Section 3(B) is not preempted by federal immigration law. *Id.* at 33a. He concluded, however, that Section 3(B) should be subjected to strict scrutiny, and that, in any event, Section 3(B) fails to satisfy rational basis review. *Id.* at 33a-42a.

A petition for rehearing en banc was denied. Pet. App. 85a-89a. Judge Higginbotham, joined by six other judges, would have granted rehearing en banc. *Id.* at 86a-88a.

DISCUSSION

I. THE QUESTION WHETHER SECTION 3(B) IS PREEMPTED BY FEDERAL IMMIGRATION LAW DOES NOT WARRANT REVIEW

Petitioners contend (Wallace Pet. 11-15; Leclerc Pet. 18-21) that the Louisiana bar rule's limitation of bar membership to citizens and permanent resident aliens is preempted by federal immigration law. That contention does not warrant review. The court of appeals correctly held that the limitation in Section 3(B) is not preempted by federal immigration law, and the Vermont Supreme Court's erroneous contrary conclusion regarding a similar Vermont rule does not provide a basis for granting review in this case.

A. Section 3(B) Is Not Preempted By Federal Immigration Law

1. a. Petitioners contend (Wallace Pet. 12-13; Leclerc Pet. 20-21) that federal law preempts Section 3(B) as applied to aliens seeking H-1B status to practice law. That contention is without merit. While the power to regulate immigration is exclusively a federal power, the Court has wisely resisted the conclusion that every state enactment that affects aliens is a regulation of immigration and therefore preempted. *De Canas* v. *Bica*, 424 U.S. 351, 354 (1976). Rather, federal immigration law preempts state law when "the nature of the regulated subject matter permits no other conclusion," *id.* at 356 (citation omitted), when "Congress has unmistakably so ordained," *ibid.* (citation omitted), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 363 (citation

omitted). Section 3(B) is not preempted under those standards.

An alien may be admitted to the United States in H-1B status in order to work in a "speciality occupation," 8 U.S.C. 1101(a)(15)(H)(i)(b) (Supp. IV 2004), and the practice of law can be a speciality occupation, 8 C.F.R. 214.2(h)(4)(ii). But in order to obtain H-1B status to practice law, an alien must *first* obtain a license from the State in which he or she intends to practice if the State requires such a license. See 8 U.S.C. 1184(i)(2)(A) (requiring "full state licensure to practice the occupation, if such licensure is required to practice in the occupation"); 8 C.F.R. 214.2(h)(4)(v)(A) ("If an occupation requires a state or local license for an individual to fully perform the duties of the occupation," an alien "must have that license prior to approval" of the H-1B visa.). By expressly incorporating a *state law* license as a *precondition* for obtaining permission to come to this country for a temporary period of time to practice law, and by failing to set any limitations on the standards a State may establish for obtaining such a license, Congress left the States largely free to determine those standards.

Thus, when the State where an alien seeks to practice permits an alien seeking H-1B status to obtain a license to practice law in the State, and the alien obtains such a license, that alien satisfies one of the federal law preconditions for obtaining H-1B status. But when the State decides that an alien's temporary status makes him or her ineligible to obtain a license to practice law in the State, and declines to issue a license on that basis, the alien has failed to satisfy one of the federal law prerequisites for obtaining H-IB status.[2]

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[2] Different considerations would be present if a State allowed aliens from some countries and not others to be admitted to the bar. Such a rule could threaten to intrude into the federal government's conduct of

Petitioners contend (Wallace Pet. 12-13; Leclerc Pet. 20-21) that Congress's decision to make a state law license a precondition for H-1B status to practice law shows that Congress intended to require States to allow aliens seeking H-1B status to be eligible to obtain a state license. That reading of the statutory scheme gets matters backwards. Congress has not required States to make aliens eligible for a license so that they would then be eligible for H-1B status. Congress has required aliens to obtain a state law license before becoming eligible for H-1B status.

Another feature of federal immigration law reinforces that conclusion. A section of a DHS regulation entitled "*Duties without licensure*" states that "[i]n certain occupations which generally require licensure, a statute may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation." 8 C.F.R. 214.2(h)(4)(v)(C). The regulation directs that "[i]f the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted." *Ibid.* That regulation reflects the understanding that an alien's ability to obtain H-1B status depends on the State's choice of licensing standards, not that a State must alter its licensing standards so that a person may become eligible for H-1B status.

That interpretation of the statutory scheme is also consistent with Congress's background understanding that States have important interests that are implicated in their licensing schemes. While many States may conclude that those interests would not be compromised by issuing licenses to those who will be present only temporarily, there is no evidence

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foreign relations. Cf. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000).

that Congress intended to preclude other States from reaching a different judgment.

It is particularly unlikely that Congress would seek to displace traditional state licensing authority when aliens seeking H-1B status may include persons residing in foreign countries who have no ties to the United States. Aliens who have already been admitted temporarily to the United States in another status may apply for a change of status to H-1B, and persons admitted to this country in an H-1B status may apply for an extension of that status in order to practice law. But there is no indication that Congress intended that such persons, merely by virtue of their presence in this country, would have any greater opportunity to obtain an H-1B status to practice law than persons applying from abroad. DHS's discretionary authority under 8 U.S.C. 1258 to permit certain aliens in the United States to change from one nonimmigrant status to another, like its authority under 8 U.S.C. 1255 (2000 & Supp. IV 2004) to permit certain aliens in the United States to adjust their status from nonimmigrant to permanent resident alien, is essentially a venue provision that enables the government to afford the alien an alternative to leaving the country and applying for a visa from a consulate abroad. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

Congress's decision to allow States to determine whether to issue a license to a person seeking H-1B status also accords with the nature of the other preconditions for that status. In particular, for an alien to obtain H-1B status, a prospective employer must file a petition on the alien's behalf. 8 C.F.R. 214.2(h)(1)(i) and (2). Just as Congress has made an alien's ability to obtain H-1B status dependent on an employer's judgment that the alien has the necessary qualifications, Congress has made the alien's ability to obtain H-1B status dependent on a State's judgment on whether the alien meets the standards necessary for a license.

b. In support of their contention that federal immigration law preempts Section 3(B) as applied to applicants for H-1B status, petitioners rely (Wallace Pet. 13-14; Leclerc Pet. 19) on *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982). Petitioners' reliance on *Toll* is misplaced.

In *Toll*, the Court held that a policy of the University of Maryland that denied in-state tuition to the dependent children of employees of the World Bank holding G-4 status was preempted by federal law. The court reasoned that Maryland's denial of in-state status to G-4 nonimmigrants directly conflicted with Congress's judgment that G-4 nonimmigrants are permitted to establish domicile in the United States. 458 U.S. at 14. The Court also concluded that Maryland's decision to use tuition as a replacement for lost tax revenue conflicted with Congress's decision to grant G-4 nonimmigrants favorable tax treatment. *Id.* at 16.

The situation here is different from *Toll* in every relevant respect. In *Toll*, the State denied a benefit to aliens that Congress had decided to admit into this country. Here, by contrast, Congress has incorporated state law licensing requirements as a precondition for obtaining H-1B status in the first place. In *Toll*, the state law rule directly conflicted with congressional judgments relating to the G-4 classification. Here, there is no conflict relating to the H-1B classification. Congress allowed each State to make its own determination on whether an alien seeking H-1B status may qualify for the practice of law in that State.[3]

2. In addition to arguing that Section 3(B) is preempted as applied to applicants for H-1B status, petitioners also appear to argue that Section 3(B) is preempted as applied to

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[3] At least two of the petitioners have H-1B status to work as paralegals. Pet. App. 7a. Because that work does not require a state license to practice law, there is no inconsistency between Section 3(B) and the federal authorization to work as a paralegal.

aliens who have J-1 or L-2 status. That claim is also without merit.

Neither the J-1 program nor the L-2 program refers to state licensing requirements. That silence hardly suggests an intent to preempt state licensing authority. Indeed, given that Congress failed to preempt state licensing authority when it specifically focused on state licensing in the H-1B program, it would be difficult to attribute to Congress an intent to preempt such authority through programs that do not mention state licensing at all.

Aliens in the J-1 and L-2 programs are authorized to work in certain circumstances. But the petitioners who have J-1 and L-2 status have not shown that their authorizations preempt state licensing authority. An alien admitted in a J-1 status to participate in an exchange program may work only when that activity is part of the exchange program, 22 C.F.R. 62.16(a), and the petitioners who have J-1 status do not claim that their exchange program includes the licensed practice of law. An alien who holds an L-2 visa may work when authorized by DHS, 8 C.F.R. 214.2(*l*)(7)(ii), and the sole petitioner with an L-2 status has a general work authorization. But a general work authorization is not intended to supersede applicable licensing requirements. Thus, just as Section 3(B) is not preempted as applied to applicants for H-1B status, Section 3(B) is not preempted as applied to the petitioners who have J-1 or L-2 status.

3. For the reasons discussed above, DHS interprets the federal scheme to allow each State to decide the extent to which aliens who seek only temporary residence in the United States will be eligible for bar membership in that State, where, as here, there is no interference with the alien's visa or federal work authorization. That reasoned judgment by the agency with primary authority over the visa and work authorization program is entitled to considerable weight. Cf.

Geier v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495-496 (1996).[4]

B. The Erroneous Decision Of The Vermont Supreme Court Does Not Provide A Basis For Granting Review In This Case

Petitioners contend (Wallace Pet. 15; Leclerc Pet. 11-12) that review is warranted on the preemption question because the decision below conflicts with *Dingemans* v. *Board of Examiners*, 568 A.2d 354 (Vt. 1989). In that case, the Supreme Court of Vermont held that a rule that limited admission to the state bar to citizens and permanent resident aliens was preempted by federal law. The court acknowledged that the "state has the ultimate interest in assuring the requisite qualifications of persons licensed to practice law within its jurisdiction," and that "the requirement that applicants for H-1 visas have all necessary licenses prior to the issuance of a visa, * * * is a reflection of the federal government's respect for this state prerogative." *Id.* at 356. The court nonetheless concluded that Vermont's limitation on bar membership "impose[d] a burden on the federal immigration program that could not have been intended by the Congress." *Id.* at 357.

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[4] The State contends (Br. in Opp. 16 n.43) that 8 U.S.C. 1622 specifically grants it authority to deny nonimmigrant aliens eligibility for a state license. That contention is incorrect. A State's authority under Section 1622 is limited to "means-tested" public benefits. H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 384 (1996). In arguing otherwise, the State relies (Br. in Opp. 16 n.43) on 8 U.S.C. 1621(c). But Section 1621(c) defines the meaning of "State or local public benefit" in Section 1621, not the meaning of "State public benefits" in Section 1622. The term "State or local public benefit" in Section 1621 is used to describe the state or local benefits for which certain categories of aliens (principally aliens present illegally) are ineligible as a matter of federal law. See 8 U.S.C. 1621(a).

For reasons discussed above, that analysis is incorrect. Congress has allowed each State to reach its own judgment on whether an alien's temporary status should affect eligibility for admission to the bar in that State; it did not intend to remove such authority. No other court has adopted the view expressed by the Supreme Court of Vermont, and an erroneous 18-year old decision by a single state supreme court is not a sufficient basis for granting review in this case.

The Supreme Court of Vermont's decision, while incorrect, also does not have an impact that creates a need for review in this case. The result is no different from a Vermont decision interpreting a rule to allow aliens who are not permanent residents to obtain a license to practice law, which it could have done.

Review is also unwarranted because the Supreme Court of Vermont did not have the benefit of DHS's views in resolving the preemption question. Now that DHS has expressed its view on that issue, the nature of the preemption question must be evaluated in a different light. It should now be clear to Vermont that if it wishes to bar aliens who are not permanent residents from bar membership, federal immigration law does not preclude that course. On the other hand, to the extent that Vermont's 18-year experience with admitting such aliens leads it to conclude that there is no reason to alter its current rule, Vermont may leave matters unchanged. Either way, there is no reason for the Court to grant plenary review based on the conflict between the Supreme Court of Vermont and the decision below.

II. THE QUESTION WHETHER SECTION 3(B) IS SUBJECT TO STRICT SCRUTINY DOES NOT WARRANT REVIEW

Petitioners contend (Wallace Pet. 5-11; Leclerc Pet. 12-17) that the court of appeals erred in failing to apply strict scrutiny to Louisiana's rule that only citizens and permanent resi-

dent aliens may become members of the Louisiana bar. Review of that contention is also not warranted. The court of appeals correctly held that Section 3(B) is not subject to strict scrutiny, and that conclusion does not conflict with any decision of this Court or with the holding of any other court of appeals.

A. Section 3(B) Does Not Trigger Strict Scrutiny

For several reasons in combination, Section 3(B) does not trigger strict scrutiny. First, while petitioners rely primarily on *In re Griffiths*, 413 U.S. 717 (1973), as support for their strict scrutiny argument (see Wallace Pet. 5-10; Leclerc Pet. 13), *Griffiths* involved a bar rule that limited membership to citizens only and therefore excluded permanent resident aliens as well as nonimmigrant aliens from the practice of law. 413 U.S. at 719. Moreover, the person challenging the rule in *Griffiths* was herself a permanent resident alien. *Id.* at 718. Louisiana's rule, by contrast, permits permanent resident aliens to become members of the bar; it excludes from eligibility only aliens who are not permanent residents. The Court's holding that the bar rule in *Griffiths* was subject to strict scrutiny therefore does not establish that Louisiana's rule is subject to strict scrutiny.

Petitioners point (Wallace Pet. 5) to the statement in *Griffiths* that "[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." 413 U.S. at 721 (quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971)). And, in reliance on *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977), they argue (Wallace Pet. 8-10; Leclerc Pet. 14-15) that Louisiana's bar rule classifies based on alienage because it is directed at aliens and only aliens are adversely affected by it.

In cases decided after *Griffiths*, however, the Court has made clear that *Griffiths* did not establish that strict scrutiny

applies to all classifications based on alienage. For example, in *Foley* v. *Connelie*, 435 U.S. 291, 296 (1978), the Court held that state law classifications based on alienage are not subject to strict scrutiny when they restrict aliens from employment in government jobs that involve "discretionary decision-making, or execution of policy, which substantially affects members of the political community." And in *Mathews* v. *Diaz*, 426 U.S. 67, 81-84 (1976), the Court held that Acts of Congress that classify on the basis of alienage are subject to a narrow standard of review akin to rational basis review, rather than to strict scrutiny. As those cases illustrate, the statement in *Griffiths* that alienage classifications are subject to strict scrutiny cannot be divorced from the context in which it appeared. And a crucial part of that context was that the state law at issue excluded permanent resident aliens as well as nonimmigrant aliens from the practice of law; *Griffiths* itself involved only a challenge by a permanent resident.

The same is true of all the other cases cited by petitioners. All of those cases involved state laws that adversely affected permanent resident aliens. See, *e.g.*, *Nyquist*, *supra*; *Examining Bd. of Eng'rs* v. *Flores de Otero*, 426 U.S. 572 (1976); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham*, *supra*. Indeed, in *Foley*, the Court expressly noted it had applied strict scrutiny to alienage classifications only when the state laws were "seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*." 435 U.S. at 295 (emphasis added).

Second, basic equal protection principles do not support the conclusion that strict scrutiny applies to all state classifications that adversely affect nonimmigrants simply because strict scrutiny applies to many state classifications that disadvantage permanent resident aliens. The Equal Protection Clause's core command is that "persons similarly circumstanced should be treated alike." *Plyler* v. *Doe*, 457 U.S. 202,

216 (1981) (citation omitted). At the same time, the Equal Protection Clause "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Ibid.* (citation omitted).

Because permanent resident aliens have been formally granted the privilege under federal law of living in the United States on a lasting basis, see 8 U.S.C. 1101(20), and they typically have strong ties to the United States, they may be viewed as similarly situated to citizens in many respects. Nonimmigrants, by contrast, have not been granted that distinct legal status under federal law; they are present only temporarily and subject to restrictions, and they do not ordinarily have the same ties to this country as permanent residents. They therefore do not, as a rule, have the same claim to equal treatment. Cf. *Mathews*, 426 U.S. at 80 (as an alien's ties to the United States grow stronger, so too does his claim to equal treatment).

Third, the claim for equal treatment is particularly unpersuasive here because Section 3(B) affects all aliens who are not permanent resident aliens, and that group includes persons who apply from abroad for visas or work authorizations and have no ties to this country and no claim under the Constitution to equal treatment. See, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950). To be sure, that group also includes nonimmigrant aliens who were admitted into this country for a limited period and for a different purpose. But as previously discussed, such persons have limited work rights, and they are in no stronger position to obtain H-1B status or broader employment opportunities than aliens applying from abroad. A provision for nonimmigrants to adjust or change their status or work rights is merely a "*procedural mechanism* by which an alien [already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601

(B.I.A. 1992) (emphasis added); see *Elkins*, 435 U.S. at 667; *Tibke* v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964). Such aliens are far more similarly situated to persons applying for such status from abroad than they are to permanent resident aliens and citizens.

Finally, as previously discussed, Congress has expressly incorporated state law licensing requirements as a precondition for the granting of H-1B status to practice law. Because Congress has broad power over immigration matters, federal laws that classify based on alienage do not trigger strict scrutiny. Instead, they are subject only to review that is akin to rational basis review. *Mathews*, 426 U.S. at 81-84. It follows that, absent circumstances not present here (see note 2, *supra)*, when Congress expressly incorporates a state law requirement as a precondition for the grant of a visa, strict scrutiny of that federally incorporated state law requirement is not warranted. Similar considerations apply to the petitioners who are in J-1 or L-2 status, because federal law does not preempt the application of Section 3(B) to them. See pp 7-16, *infra*; *Toll*, 458 U.S. at 11 n.16 (suggesting that the Court's equal protection cases involving aliens may be better explained as preemption cases). The court of appeals therefore correctly concluded that strict scrutiny is not applicable in the specific context presented here.

B. There Is No Conflict In The Circuits On Whether Strict Scrutiny Applies Here

Petitioners contend (Wallace Pet. 10; Leclerc Pet. 10) that the court of appeals' failure to apply strict scrutiny to Section 3(B) conflicts with the Fourth Circuit's decision in *Moreno* v. *University of Maryland*, 645 F.2d 217 (1981), aff'd *sub nom. Toll* v. *Moreno*, 458 U.S. 1 (1982). There is, however, no conflict.

In *Moreno*, the district court applied strict scrutiny and held that Maryland's rule denying in-state tuition to G-4 nonimmigrants violated the Equal Protection Clause. The court alternatively ruled that Maryland's policy was preempted by federal law. *Moreno* v. *Toll*, 489 F. Supp. 658 (D. Md. 1980), aff'd *sub nom. Moreno* v. *University of Md.*, 645 F.2d 217 (4th Cir. 1981), aff'd *sub nom. Toll* v. *Moreno*, 458 U.S. 1 (1982). The Fourth Circuit affirmed the district court's rulings stating only that "[f]or reasons sufficiently stated in this opinion of the district court, we agree that the University's 'In-State' status policy * * * is invalid under the Constitution." *Moreno*, 645 F.2d at 220. This Court affirmed the judgment, but solely on the ground that Maryland's policy was preempted by federal law. *Toll*, 458 U.S. at 9-10.

It is unclear whether the Fourth Circuit would feel entirely bound by its affirmance of the district court's constitutional analysis in *Moreno*, when this Court resolved the case solely on preemption grounds, and the Fourth Circuit did not conduct its own independent constitutional analysis. But even if it would, the district court's equal protection ruling in *Moreno* does not conflict with the holding below that Section 3(B) is not subject to strict scrutiny.

Moreno involved the equal protection rights of G-4 nonimmigrants, a classification not at issue here. And *Moreno* involved an additional burden on aliens that conflicted with the conditions under which they were admitted into the country, not a congressionally-sanctioned state-law precondition for obtaining a particular nonimmigrant status in the first place, or a federal work status that does not specifically authorize the practice of law. Because the decision below is the first case to address whether strict scrutiny applies in the present context, and because the court below correctly concluded that it does not, this Court's review of the question is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

KAREN LECLERC, *et al.*,

Petitioners,

v.

DANIEL E. WEBB, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF *AMICUS CURIAE* THE INNOCENCE NETWORK FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

The Innocence Network respectfully moves this Court, pursuant to Rule 37.2(b) of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the petitions for a Writ of Certiorari, Nos. 05-1645 and 06-11, to the United States Court of Appeals for the Fifth Circuit. Both sets of Petitioners have consented in writing to the filing of this brief. Respondents have not consented.

Petitioners have briefed the legal aspects of this case concerning the equal protection and preemption analyses, the conflicting appellate decisions, and the Fifth Circuit's disregard of this Court's prior precedent. The Innocence Network's attached brief does not repeat those arguments. Rather, this brief focuses on the circumstances under which the Louisiana Supreme Court changed its interpretation of Louisiana Bar Rule XVII, Section 3(B) ("Rule 3(B)"), and the harmful effects Rule 3(B) has on indigent criminal defendants in light of the shortage of criminal defense attorneys in Louisiana.

The Innocence Network, an association of nonprofit legal clinics and criminal justice resource centers across the country, has an interest in ensuring adequate representation for the indigent charged with crimes, as well as indigent prisoners who do not even have the benefit of the typically under-funded lawyers assigned by the State. Innocence Network projects play a strong leadership role in reforming the criminal justice system by formulating legislative and administrative remedies for the root causes that lead to wrongful convictions, such as eyewitness misidentification, false confessions, unreliable or fraudulent forensic science, and law enforcement misconduct. Such reforms not only protect the innocent, but also help law enforcement apprehend the real perpetrator.

Moreover, one of the Innocence Network's members, the Innocence Project New Orleans ("IPNO"), is based in Louisiana. IPNO has throughout its existence employed nonimmigrant alien attorneys. In fact, IPNO's current Director,

Petitioner Emily Maw, is one of the attorneys precluded from practicing law in Louisiana under the Fifth Circuit's ruling. Therefore, the Innocence Network is uniquely situated to comment on the harmful effects Rule 3(B) will have on Louisiana's indigent criminal defendants, its prison population, and important reform efforts to improve Louisiana's criminal justice system generally.

Over the past thirteen years, highly-trained nonimmigrant alien attorneys have been coming to Louisiana to represent indigent criminal defendants and to advocate for improved funding for indigent defense work in the State. The success of these lawyers is well documented. While the Fifth Circuit viewed Rule 3(B) as purportedly protecting the citizens of Louisiana from transient foreign lawyers who will abandon their clients, in fact the rule targets these hard-working and committed attorneys and deepens the vulnerability of Louisiana's neglected prison and indigent defendant population. Moreover, if the Fifth Circuit's ruling stands, other States could be emboldened to pass additional restrictions targeting nonimmigrant alien lawyers.

For the above reasons, we respectfully request that the Court grant this motion for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Nationwide, the Innocence Network includes more than thirty affiliated Innocence Projects, each of which provides *pro bono* legal services to indigent prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence.[2] The Innocence Network pioneered the litigation model that has to date exonerated at least 182 innocent persons by post-conviction DNA testing alone, serving as counsel in the majority of these cases. Countless innocent persons have been vindicated in total, allowing the authorities to pursue the true perpetrators.

The Innocence Project New Orleans ("IPNO") is a member of the Innocence Network. Nonimmigrant alien attorneys have

[1] *Amicus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission.

[2] The member organizations include the Arizona Justice Project, Association in the Defense of the Wrongly Convicted (Canada), Barbara C. Salken Criminal Justice Clinic at Pace University (New York), California/Hawaii Innocence Project, Center on Wrongful Convictions at Northwestern (all states), Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Florida Innocence Initiative, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, eastern Washington), Griffith University Innocence Project (Australia), Indiana University School of Law Wrongful Convictions Component, Innocence Institute at Point Park University (Pennsylvania), The Innocence Project (all states), Innocence Project Indiana, Innocence Project Midwest (Missouri, Kansas, Iowa), Innocence Project of Minnesota, Innocence Project Northwest (Alaska, Washington), Iowa/Nebraska Innocence Project, Innocence Project New Orleans (Louisiana and Mississippi), Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project, Maryland Office of the Public Defender, Innocence Project, Medill Innocence Project (all states), Mid Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Rocky Mountain Innocence Project, Second Look Program (New York), Texas Center for Actual Innocence, Texas Innocence Network, University of Melbourne Innocence Project (Australia), University of Leeds Innocence Project (United Kingdom), Wesleyan Innocence Project (Texas), and Wisconsin Innocence Project (all states).

played a pivotal role in IPNO's work on behalf of indigent criminal defendants. IPNO was founded by a nonimmigrant alien attorney in 2001, before the current interpretation of Louisiana Bar Rule XVII, Section 3(B) ("Rule 3(B)"), was adopted. The current Director of IPNO is Emily Maw, one of the Petitioners in these consolidated cases. Although Ms. Maw holds a law degree from Tulane University School of Law and meets all other qualifications for admission to the Louisiana Bar, Rule 3(B) precludes her from representing IPNO and its clients in the courts of Louisiana as a duly-licensed practicing attorney. Given the history of nonimmigrant alien lawyers who have come to Louisiana to represent indigent criminal defendants, *amicus* has a strong interest in ensuring that Rule 3(B) does not prevent IPNO from functioning effectively and from further marginalizing the indigent client population it serves.

SUMMARY OF ARGUMENT

The Fifth Circuit's ruling not only departs from this Court's Equal Protection jurisprudence, but also ignores the context in which Rule 3(B) was reinterpreted by the Louisiana Supreme Court in *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002). This background is critical because it demonstrates Louisiana's desire to exclude foreign attorneys who come to Louisiana to represent indigent criminal defendants, reverse convictions and sentences of the innocent, and improve the criminal justice system. This is exactly the type of invidious discrimination the Equal Protection Clause is meant to interdict.

To understand the context in which *Bourke* was decided, it is first necessary to understand the state of the criminal justice system in Louisiana. There is a severe shortage of criminal defense attorneys handling indigent defense cases in Louisiana. Public defenders carry caseloads far in excess of the maximum recommended by the American Bar Association. The funding allotted to indigent defense is woefully inadequate, and, perhaps not surprisingly, Louisiana leads the nation in the frequency of wrongful convictions and guilty defendants routinely receive grossly disproportionate sentences.

Consequently, the State has become a Mecca for nonimmigrant alien attorneys seeking to improve the representation of indigent criminal defendants, particularly in capital cases. These foreign lawyers, led by Clive Stafford Smith, who came to New Orleans in 1993, became members of the Louisiana Bar under the Louisiana Supreme Court's former interpretation of Rule 3(B). They founded human rights organizations in Louisiana, engaged in litigation to improve funding for indigent defense, and began representing indigent criminal defendants and prisoners in post-conviction and retrial proceedings. As a result of these skilled foreign attorneys, the number of capital charges in Louisiana was reduced by 84% over a two and one-half year period. Convictions were overturned, sentences were reduced, and funding was improved – all of which led to a backlash, particularly from prosecutors.

It was against this backdrop that the Louisiana Supreme Court overruled its prior precedent and decided to prevent nonimmigrant alien attorneys from becoming members of the Louisiana Bar. The purported reason for the reinterpretation of Rule 3(B) is that nonimmigrant alien attorneys pose more of a transience risk to their clients than do citizen or permanent resident alien attorneys. But the facts surrounding *Bourke* tell a different story. There were no complaints against foreign attorneys, only improved funding for indigent defense, zealous representation of poor defendants charged with serious crimes, and vindication of the innocent. Even the 2000-2001 Chairperson of the Louisiana Supreme Court Bar Admissions Advisory Committee has said that the real reason behind *Bourke* was invidious discrimination. As such, Rule 3(B) is a constitutionally impermissible regulation.

Rule 3(B) is also having its intended result. Nonimmigrant alien attorneys – including Petitioners Emily Maw and Caroline Wallace – cannot become members of the Louisiana Bar despite their qualifications. Foreign attorneys have been limited to working as paralegals, or forced to continue their human rights work in neighboring States. Rather than protecting its population from transient attorneys, Louisiana

is depriving its most vulnerable citizens of effective legal representation. Moreover, if the Fifth Circuit decision stands, it could embolden neighboring States – and other States around the country – to adopt similar restrictions targeting nonimmigrant aliens. This would be a step backward, only serving to further alienate the United States from the larger international human rights community.

ARGUMENT

I. There Is a Grave Shortage of Criminal Defense Lawyers in Louisiana.

The state of the indigent criminal defense system in Louisiana is so bleak that, according to a report by In Defense of Public Access to Justice, "it calls into question the ability of the entire criminal court system to dispense justice accurately and fairly." [3] Louisiana failed nine out of ten national indigent defense standards that "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." [4] The systemic ineffective assistance of counsel that pervades Louisiana's indigent defense system stems from simple mathematics: there are too few public defenders handling too many cases.[5] Given the massive caseloads carried by public defenders, it is impossible for them to spend any meaningful amount of time with one particular defendant.[6] Consequently,

[3] Catherine Beane, *Gideon Shattered Justice Stands Still in Avoyelles Parish, Louisiana*, 27-MAR Champion 6, 7 (2004).

[4] *Id.* at 8-9 (citing *LJC Adult Report Card, LJC Report Card on Adult Indigent Defense Services: ABA 10 Principles of a Public Defense Delivery System*, http://www.lajusticecoalition.org/reports+resources/report+card+adult/ (last visited Aug. 2, 2006)).

[5] *Id.* at 12-13.

[6] *Id.* at 10. Indeed, many public defenders interview their clients for the first time in the minutes preceding their hearings and do not even meet their clients outside the courtroom. *Safe Streets/Strong Communities, Who Pays the Price for Orleans Parish's Broken Indigent Defense System? A Summary of Investigative Findings*, (Released March 2006), http://www.lajusticecoalition.org/doc/SSSC-Orleans-Parish-Study.pdf (last visited Aug. 2, 2006).

Louisiana leads the nation in the frequency of wrongful convictions.[7] Innocent defendants are condemned with startling frequency and guilty defendants commonly receive sentences grossly disproportionate to their crimes.[8]

Statistics graphically depict the shortage of criminal defense attorneys handling indigent defendant cases in Louisiana. Avoyelles Parish is a rural jurisdiction in central Louisiana that served as the primary focus of an indigent defense assessment commissioned by the National Association of Criminal Defense Lawyers and researched and written by the National Legal Aid & Defender Association. It is a microcosm of the situation plaguing all of Louisiana.[9] Avoyelles Parish employs four part-time felony public defenders, each of whom handles a caseload equivalent to 166% of the national felony caseload standard, without factoring in private caseloads or indigent defense cases handled in other judicial districts.[10] For example, in addition to her Avoyelles Parish public defender cases, one felony public defender also represented 476 felony defendants in Rapides Parish, four of whom were charged with capital offenses.[11] This is over three times the national felony caseload standard without factoring in her Avoyelles Parish caseload or the time required to adequately defend a person's life against capital charges.[12] Based on her caseload, the study estimated that this attorney is able to give each client an average of only two hours of her time.[13]

Public defenders in other Louisiana jurisdictions are as overwhelmed as those in Avoyelles Parish. Part-time public

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[7] *Katrina's Impact: Hurricane Brings Attention to Long Broken Public Defense System*, (Summer 2006), http://www.lajusticecoalition.org/news/katrina/ (last visited Aug. 2, 2006).

[8] *Id.*

[9] Beane, *supra* note 3, at 13.

[10] *Id.* at 12.

[11] *Id.*

[12] *Id.*

[13] *Id.*

defenders in Calcasieu Parish carry felony caseloads that exceed national standards by an average of 440 felonies.[14] Likewise, public defenders in East Baton Rouge have an average caseload that is 3.21 times the maximum recommended by American Bar Association standards, with one particular public defender handling 1,248 cases in one year – almost ten times the recommended limit.[15] According to the East Baton Rouge Public Defender's Office, it would have to shed 68.8% of its current caseload to meet constitutional standards.[16]

Woefully insufficient funding is the main reason for the egregious shortage of public defenders in Louisiana.[17] Not even close to enough money is allocated to indigent criminal defense to support the number of public defenders necessary to provide indigent criminal defendants in Louisiana with adequate representation.[18] Moreover, the funds public defenders in Louisiana do receive barely enable them to keep their law offices open, let alone pay out-of-pocket litigation costs for necessities such as case investigations, expert witnesses, and social service assistance.[19] The result is, unsurprisingly, severely inadequate representation of indigent criminal defendants throughout Louisiana.

To make matters worse, Hurricane Katrina dealt a devastating blow to the already-beleaguered Louisiana indigent defense system. In particular, Katrina left the Orleans Parish criminal justice system in shambles.[20] Louisiana is the

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[14] *Id.* at 13.

[15] Julia Robb, *Public Defender System on Trial*, Daily Town Talk (Alexandria, LA), Feb. 9, 2004, at 4A.

[16] *Id.*

[17] *Katrina's Impact*, *supra* note 7.

[18] Beane, *supra* note 3, at 8-9.

[19] *Id.*

[20] *Hurricane Katrina*, http://www.thejusticecenter.org/lcac/katrina (last visited Aug. 2, 2006).

only State in the nation that attempts to fund its indigent defense services primarily through fees collected from traffic tickets.[21] In Orleans Parish, for example, local revenue generated through traffic tickets accounted for 75% of the public defender office budget.[22] But due to the destruction caused by Hurricane Katrina, traffic tickets simply are not being written anymore.[23] As a direct result, the Orleans Parish Public Defenders Office – which was already understaffed before the hurricane – had to lay-off thirty-six of its forty-two pre-Katrina public defenders.[24]

Yet despite the pressing need for additional attorneys to assist its indigent criminal defendant population, Louisiana – through its Supreme Court's 2002 interpretation of Rule 3(B) in *Bourke* – has chosen to *prevent* attorneys dedicated to helping indigent criminal defendants from doing so.

II. Putting *Bourke* in Context: Rule 3(B) Targets Foreign Attorneys Intending to Represent Louisiana's Indigent Criminal Defendants and Prisoner Population.

In upholding Rule 3(B)'s ban against nonimmigrant alien attorneys, the Fifth Circuit viewed the rule not as the product of invidious discrimination, but as a safeguard against the so-called "transience" of such attorneys. *LeClerc v. Webb*, 419 F.3d 405, 421-22 (5th Cir. 2005). But a review of the recent history of successful criminal defense work by nonimmigrant aliens in Louisiana, and the reaction such success precipitated from Louisiana prosecutors, shows otherwise. Indeed, the events leading up to the Louisiana Supreme Court's new "interpretation" of Rule 3(B) show that the rule is being used to prevent certain nonimmigrant aliens from serving as defense attorneys to Louisiana's indigent population, and constitutes

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[21] *Katrina's Impact*, *supra* note 7.

[22] *Id.*

[23] *Id.*

[24] *Id.*

precisely the kind of invidious discrimination the Equal Protection Clause is meant to guard against.[25]

A. Before *Bourke*: The Successful Representation of Indigent Criminal Defendants.

The history of nonimmigrant aliens coming to Louisiana to represent indigent criminal defendants, especially in capital cases, begins with Clive Stafford Smith. Stafford Smith came to the United States to attend Columbia Law School after graduating from Radley College in England. After law school, Stafford Smith was an intern, and then a staff attorney, at the Southern Center for Human Rights in Atlanta. In 1993, Stafford Smith moved to New Orleans and founded the Louisiana Crisis Assistance Center (now called the Louisiana Capital Assistance Center) ("LCAC"). The existence of LCAC, along with the increased criticism of capital punishment overseas, set the stage for dozens of idealistic Australian and U.K. lawyers to come to Louisiana to defend capital cases and work for the reform of indigent defense funding in the State.[26]

Shortly after LCAC was founded in 1993, it was involved in litigation that targeted Louisiana's under-funded indigent defense system. At that time, the maximum fee a criminal

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[25] This is not the first time the Louisiana Supreme Court has amended Louisiana's Bar rules in response to the success of *pro bono* attorneys. In 1999, the Louisiana Supreme Court amended the Louisiana Law Student Practice Rule to restrict law student representation of individuals and community organizations after clinical law students and faculty at the Tulane Environmental Law Clinic stopped the construction of a $700 million polyvinyl chemical plan in an area with eleven existing chemical plants and over 130 other industrial plants known as "Cancer Alley," a predominantly Black, lower-income community in Louisiana. *See* Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 Tul. L. Rev. 235, 237-43 (1999); Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 Wash. U. J.L. & Pol'y 33, 144-45 (2000).

[26] *News & Notes with Ed Gordon: British Attorneys Defending U.S. Death Row Inmates*, NPR Radio Broadcast, December 13, 2005 (describing LCAC as "a funnel" for British lawyers to come to the U.S.); Dana Mulhauser, *British Lawyers are Rushing to the Defense of Death-Row Inmates – In the American South*, 2005-DEC Legal Aff. 14.

defense attorney could earn in a capital trial was $1000.[27] As a result of *State v. Peart*, 621 So. 2d 780 (La. 1993), Louisiana established the Louisiana Indigent Defender Board and devoted $7 million to indigent defense in the State.[28] Five years later, LCAC sought to further improve the standard of capital defense in Louisiana by establishing the Orleans Parish Preliminary Hearing Project (the "OPPHP"). The OPPHP allowed LCAC attorneys to provide intensive assistance to all defendants charged with a capital offense in Orleans Parish. Just two and one-half years after the program was started, the OPPHP helped conclude 84% of the capital prosecutions pending in Orleans Parish, resulting in the dismissal of the charges in 100 of the 119 cases.[29]

The success of LCAC is due in large part to the lawyers' commitment to using exhaustive investigation to defend capital indictments. LCAC's emphasis on investigation has lead to the establishment of A Fighting Chance, an agency of investigators that specializes in developing mitigation evidence for criminal defendants facing the death penalty in Louisiana.[30] Continuing its efforts to help ensure that indigent criminal defendants receive a fair trial, LCAC conducted a study in 2003, known as the Blackstrikes study, which probed the process of jury selection and challenged racial bias in the jury system in Jefferson Parish, Louisiana, a suburban "white-flight" community of New Orleans. The Blackstrikes study revealed that Jefferson Parish prosecutors were three times more likely to strike a black juror than a white juror.[31]

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[27] Claire Schaeffer-Duffy, *Rare Breed: Death Penalty Lawyers Defend Rights of Politically Invisible*, http://www.natcath.com/NCR_Online/archives/100501/100501a.htm (last visited Aug. 2, 2006).

[28] About the Louisiana Capital Assistance Center, http://www.thejusticecenter.org/lcac/about.html (last visited Aug. 2, 2006); *Louisiana's System, Public Defender Funding Varies*, http://www.lajusticecoalition.org/indigent+defense/louisiana+system/ (last visited Aug. 2, 2006).

[29] About the Louisiana Capital Assistance Center, *supra* note 28.

[30] *Id.*

[31] *Id.*; Louisiana Capital Assistance Center Projects, http://www.thejusticecenter.org/lcac/lcac_projects.html (last visited Aug. 2, 2006); Blackstrikes, http://www.blackstrikes.com (last visited Aug. 2, 2006).

In addition to LCAC's policy work, Clive Stafford Smith (the Director of LCAC until 2004) is estimated to have handled more than 300 capital cases throughout his career in the United States, overturning death sentences in all but four.[32] Stafford Smith was awarded an OBE[33] for humanitarian services, and his legal skills have been lauded by distinguished members of the American Bar Association and American legal academics.[34] Although an examination of all of his successes is beyond the scope of this brief, two of Stafford Smith's Louisiana cases prove illustrative.

After being sentenced to death in Louisiana, Clarence Smith received the right to a new trial because the jury was allowed to convict him without concluding that he was guilty "beyond a reasonable doubt."[35] At his retrial, Stafford Smith showed that the prosecution's case was based solely on evidence from two criminals who had made deals with the prosecution in return for their testimony.[36] Among other things, Stafford Smith uncovered the fact that these two criminals had committed two thousand felonies, possibly including as many as twenty homicides, each of which was covered by the government's grant of immunity.[37] The defendant was subsequently acquitted, and he was released from prison.

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[32] Mulhauser, *supra* note 25, at 14; *Lawyer Interview: Living Legend*, The Lawyer, July 7, 2003, at 13.

[33] An OBE is an Officer of the British Empire, a British Order of Chivalry.

[34] *See* Anthony Lewis *et al.*, *Panel Discussion, The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 Hous. L. Rev. 1105, 1192 (1994); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 Penn St. L. Rev. 1133, 1134 (2005).

[35] The trial judge's instructions described the level of doubt required to acquit as "grave uncertainty, substantial, actual, or serious doubt." *See State v. Smith*, 600 So. 2d 1319, 1327 (La. 1992).

[36] Lewis, *supra* note 34, at 1192.

[37] *Id.*

Another capital case that received substantial pretrial publicity in Louisiana involved Shareef Cousin, who was charged with the shooting death of a man outside a popular restaurant in the French Quarter.[38] In his zeal to convict, the prosecutor did not inform the defense that on the night of the murder, the one eyewitness to the crime told the police that she did not get a good look at the gunman's face and that she probably would not be able to identify him.[39] Nor did the prosecutor disclose that, in an interview three days later, she admitted that she was not wearing her glasses or contact lenses on the night of the murder and could only see patterns and shapes.[40] Without the benefit of this information, the jury convicted Cousin of first-degree murder and sentenced him to death. At the post-conviction and retrial proceedings, Stafford Smith uncovered the exculpatory evidence, leading to the case's dismissal and a civil suit and disciplinary action against the prosecutor.[41]

In addition to the criminal defense work done by LCAC and Stafford Smith, the Innocence Project New Orleans ("IPNO") has also achieved great success defending indigent criminal defendants in Louisiana. IPNO was founded in 2001 by Emily Bolton, another nonimmigrant alien attorney from the U.K., who was admitted to practice in Louisiana before *Bourke*.[42] Two of the many prisoners that Bolton helped exonerate each spent over twenty-seven years in prison for a crime they did not commit.[43] Greg Bright and Earl Truvia were

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[38] Hoeffel, *supra* note 34, at 1134.

[39] *Id.* (citing *State v. Cousin*, 710 So. 2d 1065, 1066-67 (La. 1998)).

[40] *Id.*

[41] *Id.*

[42] Innocence Project New Orleans People, http://www.ip-no.org/people.htm (last visited Aug. 2, 2006).

[43] Innocence Project New Orleans Cases, http://www.ip-no.org/cases.htm (last visited Aug. 2, 2006); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 161 (2003).

convicted of second-degree murder and sentenced to life without parole. Their convictions were based solely on the testimony of a supposed eyewitness. But the jury never heard from the coroner, who would have testified that the real time of death did not correlate with the time the eyewitness claimed she saw the murder.[44] Moreover, IPNO revealed that the eyewitness was on heroin, suffered from auditory and visual hallucinations, and gave the police information in exchange for cash.[45] After an evidentiary hearing in 2002, where IPNO demonstrated the above facts, the Louisiana Supreme Court reversed the defendants' convictions and ordered a new trial. Subsequently, the Orleans Parish District Attorney dismissed all charges.[46]

Stafford Smith, Bolton, and their associates at LCAC and IPNO – mainly nonimmigrant alien attorneys from the U.K. and Australia – have represented indigent criminal defendants and prisoners despite the poor pay and long hours. Joe Cook, Executive Director of the Louisiana branch of the American Civil Liberties Union, noted, "Foreign-born lawyers, working as volunteers or for very little, often are the only ones willing to take on death row cases."[47] Capital case defense work pays so little in Louisiana that there is apparently a saying that the only attorneys willing to do it are "the town drunk or the kid just out of law school."[48]

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[44] Innocence Project New Orleans Cases, *supra* note 43; Medwed, *supra* note 43, at 160-61.

[45] Innocence Project New Orleans Cases, *supra* note 43; Medwed, *supra* note 43, at 160-61.

[46] Innocence Project New Orleans Cases, *supra* note 43.

[47] *Federal Appeal Court to Hear State Rule Against Foreign Lawyers*, The Associated Press State & Local Wire, Oct. 3, 2004, at State and Regional section.

[48] Anne Simpson, *The Lifesaver of Death Row: Clive Stafford-Smith is a Briton who Dedicates His Life to Defending the Condemned in the U.S.*, The Herald, March 26, 2004, at 16; *Lawyer Interview: Living Legend*, The Lawyer, July 7, 2003, at 13.

B. *Bourke*: The Louisiana Supreme Court's New "Interpretation" of Rule 3(B).

Not surprisingly, the efforts of the foreign lawyers at LCAC and IPNO to assert the rights of their indigent clients earned them the enmity of Louisiana prosecutors and certain members of the public. Stafford Smith and others who do similar work in Louisiana have received death threats and complaints from police and prosecutors.[49] John Sinquefield, an assistant district attorney in Baton Rouge, told the Dallas Morning News in 2002, "I'm certain that I could raise some money to buy Stafford Smith a one-way ticket back to England. I'd be happy – very happy – to do that."[50] Further, Wayne Frye, the first assistant district attorney for Louisiana's Calcasieu Parish, stated that, "we have an adequate system of indigent defense here," and assailed the foreign lawyers as "other people coming and meddling in our business."[51]

It was in this context that the Louisiana Supreme Court reinterpreted Rule 3(B) in *Bourke*. Notably, Richard Bourke, the individual who prompted the Louisiana Supreme Court's reinterpretation of Rule 3(B), came to Louisiana from Australia to assist Stafford Smith at LCAC.[52] Prior to *Bourke*, Louisiana – like virtually every other State – was content to allow nonimmigrant aliens to become members of the Bar. In the early 1980s, the Louisiana Supreme Court expressly held that the term "resident alien" means an "alien who is lawfully residing in the United States." *In re Respondek*, 442 So. 2d 435, 435 (La. 1983); *see also In re Appert*, 444 So. 2d 1208, 1208 (La. 1984). Yet in 2002, after as detailed above, years of

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[49] *See* Andrew Buncombe, *Goodbye to Death Row: Briton Who Gave Hope to the Hopeless Goes Home*, The Independent (London), June 24, 2004, at First Edition; NEWS section.

[50] *Lawyer Interview*, *supra* note 48.

[51] Mulhauser, *supra* note 25, at 15.

[52] James Gill, Editorial, *Foreign Attorneys Await Decision of Import*, Times-Picayune (New Orleans), October 5, 2003, at 7.

nonimmigrant aliens successfully representing indigent clients in Louisiana, the Louisiana Supreme Court overruled its decisions in *Respondek* and *Appert* without explanation, and held that the term "resident alien" only applies "to those aliens who have attained permanent resident status in the United States." *Bourke*, 819 So. 2d at 1022.

There is no reason to believe that the Louisiana Supreme Court's sudden about face in *Bourke* was grounded on any concern over the "transience" of nonimmigrant alien attorneys in Louisiana. As Stephen Griffin, Professor of Law at Tulane University School of Law in New Orleans, noted, "There have been no ethical complaints against a foreign lawyer, no allegations. The ruling just came out of the blue."[53] Indeed, the Court's opinion does not mention any concern about the "transience" of nonimmigrant alien attorneys. As Judge Fallon stated, "If the Louisiana Supreme Court were concerned with transience, the Rule would be calculated to address that problem directly." *Wallace v. Calogero*, 286 F. Supp. 2d 748, 763, (E.D. La. 2003), *rev'd*, *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005). Aside from the argument that nonimmigrant aliens are only allowed in the United States for a fixed period of time, Respondents have provided no statistical proof, or proof of any kind, that nonimmigrant alien attorneys are more of a "transience" risk than citizen or immigrant alien attorneys. Nor has the Louisiana Supreme Court followed the recommendation of two of its Justices in calling for a committee to study this issue and provide a recommendation to the Louisiana Supreme Court. *See Bourke*, 819 So. 2d at 1022 (Calogero, C.J., dissenting) ("The court's action today illustrates the necessity for . . . a committee."); *In re Marty*, 819 So. 2d 278, 278 (La. 2002) (Johnson J., concurring) (supporting an appointing committee to study the issue).

Against this backdrop, it is clear that Rule 3(B), as reinterpreted, was specifically designed to prevent

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[53] Doug Simpson, *Lawsuit Challenges Louisiana Ban on Nonresident Foreigners Taking Bar Exam*, Associated Press, May 6, 2003, at Domestic News section.

nonimmigrant aliens from serving as defense attorneys to Louisiana's indigent population. According to Dane S. Ciolino, Chairperson of the Louisiana Supreme Court Bar Admissions Advisory Committee from 2000 to 2001, "The real reason behind the rule change is that the district attorneys absolutely hate these people, because they are passionate about these cases, and they work the DAs to death." [54]

C. Rule 3(B), as Reinterpreted, Is the Product of Invidious Discrimination.

Prejudice against foreign lawyers is nothing new. As one commentator has noted, "Disdain of foreign lawyers has been embedded in the American legal tradition." [55] Yet the discrimination is compounded in this case, because here, Louisiana has specifically targeted a group of foreign lawyers whose mission it is to represent another politically unprotected and historically-disadvantaged group, the indigent prisoner population.

Rule 3(B) violates the Equal Protection Clause. As both Petitioners demonstrate in their Petitions for a Writ of Certiorari, the Fifth's Circuit's ruling in *LeClerc* squarely conflicts with this Court's holding that, "Classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discreet and insular' minority . . . ." *In re Griffiths*, 413 U.S. 717, 721 (1973) (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)) (internal citation omitted). *Griffiths* did not carve out an exception for nonimmigrant aliens and, as demonstrated below, there is no justifiable reason to do so. Rule 3(B) should be analyzed under strict scrutiny.

Even if rational basis were to apply to Rule 3(B), the rule would still violate the Equal Protection Clause. The concern

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[54] Mulhauser, *supra* note 26, at 15; Biographical Information for Dane S. Ciolino, http://www.loyno.edu/~dciolino/Biographical_Info/bio.htm (last visited Aug. 2, 2006).

[55] Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 Seton Hall Const. L. J. 103, 103 (1996).

over a nonimmigrant alien's "transience" that purportedly justifies Rule 3(B) is not supported by the facts. As this Court stated in *Romer v. Evans*, a law upheld under rational basis must be "narrow enough in scope and grounded in a *sufficient factual context* for [the Court] to ascertain some relation between the classification and the purpose it serve[s]." 517 U.S. 620, 632-33 (1995) (emphasis added). Rule 3(B) does not satisfy that test. *See also U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection under the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.").

III. *Bourke* Prevents Qualified Foreign Attorneys From Representing Indigent Criminal Defendants.

Rule 3(B), as reinterpreted, is serving its intended purpose. Two examples suffice to demonstrate the point.

In 2004, after Emily Bolton returned to the U.K. to care for ailing family members, Emily Maw took over as Director of IPNO. Maw is a nonimmigrant alien attorney from Wales and one of the Petitioners in these consolidated cases. Maw was inspired to come to Louisiana after hearing that it has the highest incarceration rate in the United States, with more than 36,000 prisoners.[56] Louisiana also imposes the longest sentences, with 3,808 prisoners serving life without parole, and holds ninety-two death row inmates awaiting lethal injection.[57] In 2003, however, in part because of Rule 3(B), IPNO began allocating some of its resources to Mississippi.[58] Maw, a 2003 graduate of Tulane Law School, is licensed to practice

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[56] Gareth Morgan, *A Welsh 'Angel of Mercy' is Fighting to Prove the Innocence of US Lifers and Prisoners on Death Row. Now the Americans Want to Stop Her...*, Western Mail and Echo Ltd, October 11, 2004, at 1.

[57] *Id.*

[58] Jackson, *Innocence Project Opening Office in Mississippi - Legal-Aid Clinic Has Helped to Exonerate 131 Convicted*, The Commercial Appeal, Aug. 5, 2003, at DS8.

law in Mississippi and has already developed an impressive track record of exonerating the innocent and reversing wrongful convictions there.[59]

In Louisiana, IPNO is currently trying to overturn the conviction of Travis Hayes, a man serving a life sentence for allegedly driving the getaway car in a 1997 homicide of a grocery store owner.[60] Hayes' friend, Ryan Mathews, was convicted as the gunman and sent to death row. *See State v. Hayes*, 806 So. 2d 816, 820-21 (La. Ct. App. 2001). But in 2004, Matthews was released after five DNA tests failed to establish any link between Matthews and clothing – including a ski mask – thrown from a car fleeing the crime scene.[61] In fact, the DNA evidence linked the ski mask used in the murder to another man, Rondell Love, who is serving a sentence for a separate homicide committed six months after the grocer was killed.[62] Despite Matthews' exoneration, and the undisputed fact that Hayes was with Matthews on the night of the murder, Hayes is still serving a life sentence at the Louisiana State Penitentiary at Angola. Although IPNO, led by Maw, was instrumental in reopening Hayes' case, Rule 3(B) precludes Maw from representing Hayes in the current court proceedings addressing his innocence.

Similarly, Caroline Wallace, one of the other Petitioners in these consolidated cases, cannot sign pleadings or represent

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[59] Earlier this year, Maw helped exonerate Cedric Willis, a Mississippi man who spent twelve years in prison for a murder and robberies he did not commit. In September 2005, based largely on the exculpatory evidence brought to light by Maw, the court reversed Willis' conviction and granted him a new trial. Upon joint motion of the defense and the State, the court dismissed the charges against him. Jimmie E. Gates, *Man Released After 12 Years in Prison*, The Clarion-Ledger, March 7, 2006, at 1A.

[60] Innocence Project New Orleans News, http://www.ip-no.org/news.htm (last visited Aug. 2, 2006).

[61] *Id.*; Henry Weinstein, *One Man Goes Free, Another Waits*, L.A. Times, July 27, 2006, at 22.

[62] Innocence Project New Orleans News, *supra* note 60; Weinstein, *supra* note 61.

defendants in Louisiana's courts. Wallace has a law degree from Cambridge University, and is licensed to practice law in England and Wales. Although she has sat for and passed the Louisiana Bar Exam, her current work is limited to paralegal duties for the Capital Post Conviction Project of Louisiana. For the past three years, Wallace has been working closely with the Innocence Project New York and a prominent Minnesota law firm to prove that Damon Thibodeaux, a young man sitting on death row in Louisiana, is innocent, convicted by a false confession. Although critical proceedings on the case are beginning this month, and Wallace is one of the most knowledgeable attorneys about Thibodeaux's case, Rule 3(B) precludes Wallace from representing him.

In sum, Rule 3(B)'s purported goal of protecting the citizens of Louisiana from transient foreign attorneys is having the opposite effect on one of Louisiana's most vulnerable and underserved populations. As Judge Fallon anticipated, Rule 3(B) is certainly "depriving the public of excellent legal representation" in Louisiana. *See Wallace*, 286 F. Supp. 2d at 764.

IV. If *LeClerc* Stands, the Potential Harm Extends Outside Louisiana's Borders.

In *LeClerc*, the Fifth Circuit carved out a nonexistent exception to this Court's equal protection jurisprudence involving discrimination based on alienage, and paved the way for further discrimination against nonimmigrant aliens. As noted above, Louisiana's Rule 3(B) has encouraged nonimmigrant alien attorneys to become licensed in neighboring States and to shift their representation to the indigent criminal defendants and prisoners there. If *LeClerc* stands, however, and Mississippi and Texas are motivated to institute similar restrictions on the practice of law, *LeClerc* virtually guarantees that the restrictions will be upheld as constitutional. Moreover, *LeClerc* could embolden other States outside of the Fifth Circuit's jurisdiction to discriminate against nonimmigrant alien attorneys. To the extent these foreign attorneys are working in the United States to exonerate

wrongfully-convicted prisoners or represent indigent defendants, excluding them would weaken the United States' position in the international community, particularly with regard to human rights.

Over the past few years, this Court has taken an increased regard of international law in its decisions implicating human rights. In *Atkins v. Virginia*, for example, this Court referenced an amicus curiae brief filed by the European Union in favor of banning the execution of the mentally ill. 536 U.S. 304, 316 n. 21 (2002). Similarly, in *Lawrence v. Texas*, this Court referred to the European Court of Human Rights for evolving standards of decency regarding sexual orientation. 539 U.S. 558, 573 (2003). And, most recently, in *Roper v. Simmons*, international opinion weighed heavily in this Court's decision to overturn the juvenile death penalty. 543 U.S. 551, 575-78 (2005). According to Justice Kennedy, "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty .... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.* at 578. The Fifth Circuit's opinion in *LeClerc*, however, represents a step in the opposite direction. In order for the United States to remain active participants in the global human rights arena, there must be more, not less, dialogue between United States and foreign attorneys.

CONCLUSION

For the foregoing reasons, the Innocence Network respectfully urges this Court to grant the Petitions for a Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,
Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,
Respondents,

KAREN LECLERC, ET AL.,
Petitioners,

v.

DANIEL E. WEBB, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF TULANE UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

05-1645

CAROLINE WALLACE AND EMILY MAW,
Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,
Respondents,

06-11

KAREN LECLERC, ET AL.,
Petitioners,

v.

DANIEL E. WEBB, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF TULANE UNIVERSITY LAW SCHOOL FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), Tulane University Law School ("Tulane") respectfully moves this Court for leave to file the accompanying brief as an *amicus curiae* in support of the Petitions in Nos. 05-1645 and 06-11 (as consolidated by this Court).

A letter of consent to the filing of this brief has been received from Petitioners Wallace and Maw. Respondents, Pascal F. Calogero, Jr., in his official capacity as Chief Justice of the Louisiana Supreme Court, et al., have declined to consent, thereby requiring this motion.

Tulane's interest in this case stems from its more than 150 years of international legal training and focus on comparative law. In recognition of the trend towards globalization of the legal profession, Tulane fashioned a unique curriculum by incorporating both the common law and civil law traditions. Foreign students comprise a significant percentage of Tulane's student body, and these students contribute considerably to the academic environment. To promote its international mission, Tulane has built significant relationships with foreign legal institutions. As a result, Tulane has developed a worldwide reputation as an elite legal training ground, particularly in the field of international and comparative law.

The Fifth Circuit's ruling upholding the Louisiana Supreme Court's revised interpretation of Rule XVII Section 3(B) detrimentally impacts both the Tulane and the Louisiana legal community. *Compare In re Bourke*, 819 So.2d 1020, 1022 (La. 2002), *reh'g denied*, 820 So.2d 565 (2002) (reinterpreting the term "resident alien" in Section 3(B) as limited to aliens who have been granted permanent resident status in the United States and excluding those who are lawfully residing in the country under a temporary visa with a finite term) *with In re Appert*, 444 So.2d 1208 (La. 1984) (holding that all foreign nationals lawfully within the United States are considered "resident aliens") and *In re Respondek*, 442 So.2d 435 (La. 1983) (interpreting the term "resident alien" to mean an alien who is lawfully residing in the United States). Louisiana will suffer monetary loss and its citizens will be deprived of the specialized expertise that nonimmigrant alien lawyers offer. Indigent and underrepresented clients will be particularly harmed by Louisiana's alienage-based ban

because foreign lawyers, like the petitioners, often champion less remunitive or unpopular causes.

The Fifth Circuit's decision has slammed the door in the face of Louisiana's nonimmigrant law students legally admitted into the United States, forcing them to sit for the bar in states other than where they attended law school and established their U.S. residence. If this newly-minted discrimination against nonimmigrant aliens spreads to other states and professions, it will create a greater jurisdictional patchwork and handicap the ability of foreign students and lawyers to practice their specialized professions in the United States. This result would reduce the pool of qualified professionals in this country and heighten the potential for backlash from foreign institutions and governments to the detriment of the international legal community. All of these concerns hamper Tulane's ability to remain competitive in the local, national, and international legal marketplaces. Accordingly, Tulane University Law School respectfully requests leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Tulane University Law School ("Tulane") has educated lawyers for over 150 years. Guided by Louisiana's unique legal history and heritage, one of Tulane's principle missions is to provide a welcoming and rigorous academic environment for both U.S. and foreign students.

Tulane has diligently developed an extensive international and comparative law curriculum and actively recruits foreign students for admission to its J.D. and LL.M. programs. In recent years, the foreign students have comprised nearly ten percent of the student body and have contributed substantially to Tulane's academic environment. Tulane also has built significant relationships with legal institutions throughout the world. As a result of its hard work, some have ranked Tulane as the leading comparative law school in the country and it has earned a worldwide reputation for its international and comparative law programs.

Tulane is significantly harmed by the Fifth Circuit's interpretation and application of constitutional law with respect to upholding Louisiana State Bar Rule XVII Section 3(B) ("Section 3(B)"). The ruling detrimentally impacts Tulane's educational environment and, as a consequence, adversely affects the local and national legal communities. One petitioner, Emily Maw, received her J.D. from Tulane in 2003 and has been denied admission to the Louisiana State Bar, the state in which she has continuously resided since enrolling at Tulane.[2] The Fifth Circuit's decision hampers Tulane's abil-

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[1] Pursuant to SUP. CT. R. 37.6, counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

[2] Petitioner, Emily Maw, is a member of the Mississippi Bar and resides in New Orleans, Louisiana. Maw is the Director of the Innocence Project–New Orleans. Unlike many other Louisiana Bar members, Maw promptly returned to her post after Hurricane Katrina to serve her indigent clients. Additionally, the U.S. government recently granted Maw a three-year visa extension.

ity to fulfill its international mission, to maintain its elite reputation for the study of international and comparative law, and to remain competitive in the legal education marketplace.

SUMMARY OF ARGUMENT

The Fifth Circuit erred in upholding the Louisiana Supreme Court's reinterpretation of Section 3(B) as constitutional under the Equal Protection Clause of the Fourteenth Amendment. In the face of *In re Griffiths*, 413 U.S. 717 (1973), Louisiana is the only state in the nation to deny lawfully admitted aliens admission to its bar. The practical result is that nonimmigrant aliens "lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such states as chose to offer hospitality." *Truax v. Raich*, 239 U.S. 33, 42 (1915). The restricted scope for those eligible for the Louisiana Bar under Section 3(B) violates the Fourteenth Amendment because "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax*, 239 U.S. at 41.

This Court recently recognized the benefits of classroom diversity as important and laudable. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). These benefits will be stifled by the Fifth Circuit's decision that prevents nonimmigrant aliens from sitting for the Louisiana Bar, thereby discouraging nonimmigrant aliens from attending law schools in Louisiana. Tulane and its students are, and will be, harmed as the distinct contributions of international students at the law school diminish. The Louisiana Bar will also suffer a shortage of attorneys with innate understanding of foreign legal systems and cultures. Lawyers frequently represent foreign countries and resident nationals in U.S. courts, and precluding nonimmigrant aliens' admission to the Louisiana Bar hampers the

ability of clients to receive the quality of representation they may require in an ever-globalizing economy.

The ruling does not comport with Louisiana's regulation of most other specialized professions. The risk of transient professionals leaving the jurisdiction is in no way particular to attorneys. If the ruling stands, Louisiana may choose to deny nonimmigrant aliens licenses in other professions. This would significantly impact all nonimmigrant aliens as well as educational programs at Tulane and other educational institutions. Moreover, other states could elect to follow Louisiana's departure from precedent.

The reinterpretation of Section 3(B) also violates the Supremacy Clause. The rule prohibiting nonimmigrant aliens from sitting for the Louisiana Bar directly contradicts the federal law authorizing such aliens to enter the United States to pursue a specialized profession upon obtaining the requisite licensing. Moreover, employers will be discouraged from sponsoring aliens for legal permanent residency as expressly provided by Congress in the Immigration and Nationality Act. Tulane's resulting inability to place well-qualified foreign students in employment limits its ability to attract them to the school, thereby severely tarnishing Tulane's international allure. The tremendous negative impact on Tulane, as well as on other institutions of higher education and the legal community, caused by the Fifth Circuit's misinterpretation of the Equal Protection and Supremacy Clauses merit grant of certiorari to decide the important issues presented in this case.

ARGUMENT

Petitioners present compelling legal reasons for granting certiorari in this case: The Fifth Circuit's ruling violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, and directly contradicts federal law that preempts Louisiana State Bar Rule XVII Section 3(B) under

the Supremacy Clause, U.S. Const. art. VI. *Amicus curiae* will show how this unconstitutional discrimination against nonimmigrant aliens harms Tulane, its alumni, the Louisiana Bar, and Louisiana residents. If this ruling is allowed to stand and is extrapolated to other states and professions, the negative impact will be felt nationwide.

1. THE DECISION BELOW IMPEDES TULANE'S LONG-STANDING MISSION OF BEING A SCHOOL OF INTERNATIONAL STATURE.

Tulane has emphasized international and comparative law studies as part of its curriculum since the 1850's. As one of the first U.S. law schools to implement a dedicated international and comparative program, Tulane scholars literally wrote the first book on comparative law in the United States.[3] Because of its preeminence in this field, Tulane was selected as the host institution for the Centennial World Congress on Comparative Law in 2000, drawing distinguished jurists and legal scholars from around the world.[4] Tulane's comparative and international law program is one of the best and longest-standing in the country.[5]

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[3] *See* Gustavus Schmidt, *The Civil Law of Spain and Mexico* (New Orleans: printed for the author by T. Rhea) (1851) (Gustavus Schmidt was a founder and former Dean of Tulane University Law School).

[4] *See* Nick Marinello, *Comparative Law: Back to the Future*, Inside Tulane (November 15, 2000), *available at* http://www2.tulane.edu/EditorialNewsDetails.cfm?EditorialID=469 (last visited July 28, 2006).

[5] Ugo Mattei, *Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, 50 Am. J. Comp. L. 87, 95 (2002) (In the rankings, "[t]he gold medal is given to Tulane Law School."). *See also* David Clark, *The Oxford Handbook of Comparative Law* (David Clark et al., eds., Oxford University Press) (forthcoming Nov. 2006). In analyzing the development of comparative law in the United States, Mr. Clark devotes an entire section of Chapter 5 to Tulane Law School, the only law school meriting such consideration.

Due to Louisiana's unique civil law history and its locale, Tulane is distinctly situated to attract international students. As one of the only U.S. schools that provides extensive and in-depth instruction in both civil and common law, Tulane serves as a bridge between the two major legal systems of the Western world. International students choose Tulane because of its ability to teach both legal systems and provide a unique learning atmosphere. Tulane now finds itself in a jurisdiction that denies qualified nonimmigrant aliens the opportunity to practice law in the state of their choice, impeding Tulane's ability to attract foreign students who have always enriched the school.

Tulane attracts international students by providing a welcoming academic environment both inside and outside the classroom. Tulane offers a wealth of common law and civil law courses, including over eighty courses related to international issues; seminars, symposia, and lectures on all aspects of international and comparative law through the Eason-Weinmann Center for Comparative Law; nine summer school sessions abroad in six different countries; and student and faculty exchange programs with twelve international universities on four continents. Tulane's international and comparative law courses are taught by a well-published and internationally-recognized permanent and visiting faculty.[6] Tulane's student-edited publications include the *Tulane Journal of International & Comparative Law*, and *The Tulane Law Review*, the masthead for which has long read: "*Devoted to the Civil Law, Comparative Law & Admiralty Law.*"[7]

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[6] Tulane is one of the few universities in the world to have two faculty members elected to the Academy of Comparative Law at the Hague—Professors Thanassi Yiannopoulos and Vernon Palmer. Professor Palmer was recently knighted as a *Chevalier* in the French Legion of Honor.

[7] Additionally, the *Tulane Law Review*, founded in 1916 as the *Southern Law Quarterly*, became an official organ of the *Comparative Law Bureau Annual Bulletin of the American Bar Association* in 1929. Although the motto of *Tulane Law Review* has undergone minor changes

In addition, Tulane publishes *The Tulane European & Civil Law Forum*, a faculty-edited journal.

Tulane also promotes education of foreign lawyers in other ways. For example, Tulane sponsors a Ph.D. program in American Law for members of the law faculty at the Monterrey Institute of Technology in Monterrey, Mexico. Tulane also supports international students by offering significant scholarships and grants. The Louisiana legal community assists Tulane in welcoming and promoting the education of foreign students.[8] For instance, several New Orleans law firms hold receptions each year for Tulane's international LL.M. students in order to build relationships with these foreign lawyers.

The 2002 reinterpretation of Section 3(B) to prevent nonimmigrant aliens from obtaining state licensure significantly impedes Tulane's efforts to preserve a diverse international student body and maintain the law school's international prestige. The decision discourages prospective international applicants from attending Tulane, knowing that they will not be afforded the same professional opportunities offered in other jurisdictions.[9]

No other state in the country has a restriction to bar licensure, like the one created under Section 3(B), that discriminates against nonimmigrant aliens.[10] Some states have

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over the years, its founding motto was "Dedicated to Civil Law, Comparative Law and Codification."

[8] Ironically, even the Louisiana Supreme Court promotes its international heritage by advertising "its roots in the colonial governments established by France and Spain." *See* Louisiana Supreme Court History, *available at* http://www.lasc.org/about_the_court/history.asp (last visited July 27, 2006).

[9] Other U.S. jurisdictions allow all international students to be admitted to the State's Bar. *See, e.g.*, N.Y. CT. R. §§ 520.1-520.15 (the bar admission rules of New York do not impose a residency requirement).

[10] *See* Eric Freeman, *Barriers to Foreign Professionals Working in the United States*, Center for Economic and Policy Research, *available at* http://www.cepr.net/publications/professional_supplement.htm (last

addressed Louisiana's transiency concerns through bar admissions rules without violating the Equal Protection Clause, while still welcoming foreign lawyers. For example, South Dakota and Minnesota allow nonresidents to be admitted to the bar upon establishing an office in the state, or upon appointing an agent within the state to accept service.[11] This solution addresses transiency concerns while allowing the states to maintain the benefits of admitting immigrant lawyers to their respective bar.[12]

Interestingly, the Louisiana Bar continues to allow foreign-trained lawyers who have never attended law school in the United States to be admitted to the bar.[13] The ABA

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visited July 28, 2006). Contrary to Respondents' contention, neither New Hampshire nor Rhode Island prohibit the licensing of nonimmigrant aliens. *See* R.I. SUP. CT. R., art. II, R. 1(a) (an applicant must be "a citizen of the United States or legal resident"). *See* N.H. SUP.CT.R. 42(3)(a) ("any person domiciled in the United States . . . shall be eligible to apply for examination"); N.H. REV. STAT. 21:6-a ("Residence or residency shall mean a person's place of abode or domicile. The place of abode or domicile is that designated by a person as his principal place of physical presence for the indefinite future to the exclusion of all others.").

[11] Minn. Bar Admiss. R. 4; S.D. CODIFIED LAWS § 16-16-2.

[12] As Petitioners argue, the appropriate standard to apply to this analysis is strict scrutiny. Under strict scrutiny, Louisiana's concerns regarding transiency (if compelling) must be addressed in the least restrictive means possible. The statutes in South Dakota and Minnesota suggest at least one possibility of a "least restrictive means possible" approach to address the concerns of the Louisiana Bar Association. *See* Minn. Bar Admiss. R. 4; S.D. CODIFIED LAWS § 16-16-2.

[13] *See* La. Bar Admiss. R. XVII, § 6; *see also Jia v. Bd. of Bar Exam'rs*, 696 N.E.2d 131 (Mass. 1998) (In *Jia*, the court held that Jia could not be admitted to the Massachusetts Bar despite the fact that Jia's Chinese law degree combined with his M.C.L. and S.J.D. received from Tulane qualified him to sit for, and be admitted to, the state bars of Louisiana and New York.). Indeed, before the 2002 reinterpretation, other nonimmigrant aliens were admitted to the Louisiana Bar under the identically worded rule.

guidelines presume that foreigners who receive a J.D. from a U.S. law school will be eligible for bar admission.[14] Only Louisiana has deviated from the ABA's universal assumptions, generally adhered to by other U.S. states. Louisiana's reinterpretation of Section 3(B) results in nonimmigrant aliens who study law in the United States, at ABA approved institutions, being denied the opportunity to sit for the Louisiana Bar while others who never studied in a U.S. law school are eligible to practice law in the States. This result is not rational.

In an era when "[a]ny law dean worth his or her salt will tell alumni and students that it is important for their school to be 'international,'" many law schools are seeking to diversify their educational programs.[15] The decision is likely to discourage foreign students from seeking admission to any U.S. law school out of fear that bar admission rules may change in other states while the nonimmigrant student is attending school. That is, foreign applicants will find themselves in the same situation as the petitioners in this case.[16] Foreign students seeking an international legal education are now presented with a number of opportunities to study in countries like Australia, Asia, and Europe. Given the potentially hostile environment these students could face in the

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[14] The American Bar Association (ABA) Lawyer's Manual on Professional Conduct recognizes that foreign trained lawyers may seek admission to U.S. State Bars. The Manual states that foreign lawyers may be required to take the bar exam and/or attend law school in the United States in order to be admitted to the bar. *See* ABA/BNA Lawyer's Manual on Professional Conduct, last updated June 28, 2006.

[15] David E. Van Zandt, *Globalization Strategies for Legal Education*, 36 U. Toledo L. Rev. 213, 213 (2004).

[16] This fear is not unfounded. When Petitioners Maw and Wallace began law school, the Louisiana Bar admitted similarly-situated nonimmigrant aliens to the Bar. *Compare In re Bourke*, 819 So.2d 1020, 1022 (La. 2002), *reh'g denied*, 820 So.2d 565 (2002) *with In re Appert*, 444 So.2d 1208 (La. 1984) and *In re Respondek*, 442 So.2d 435 (La. 1983).

United States, they may opt not to seek admission to U.S. schools in light of opportunities available in other countries. This is a result that has far reaching consequences for both U.S. law schools and the practice of law in this country.

If this Court does not grant certiorari to clarify the issues presented, the rationale used to justify the discrimination against nonimmigrant aliens in bar licensure may be extended to other professions. Currently, most Louisiana professional licensing authorities do not prevent nonimmigrant aliens from obtaining professional licenses. For instance, non-citizen applicants for medical licenses are only required to present a valid visa entitling them to work and reside in the United States.[17] In fact, the Louisiana Board of Medical Examiners grants nonimmigrant aliens a temporary license to be used during the pendency of their nonimmigrant visa application.[18] Additionally, the State does not require engineers to meet residency requirements before obtaining state licensure.[19] Among the other professions in Louisiana that do not limit licensure based on alienage status are: horticulturists,[20] home inspectors,[21] occupational therapists[22] and radiologic technologists.[23]

All professions have some risk that individual professionals will skirt their duties and leave behind injured persons with no recourse. However, to date, despite the same risks

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[17] LA. ADMIN. CODE tit. 46, pt. XLV, § 311(A)(3).

[18] LA. ADMIN. CODE tit. 46, pt. XLV, § 401(A).

[19] LA. ADMIN. CODE tit. 46, pt. LXI, § 903; *see also Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (holding that prohibition on aliens engaging in private practice of engineering deprived them of their constitutional rights).

[20] LA. ADMIN. CODE tit. 7, pt. XXIX, § 105.

[21] LA. ADMIN. CODE tit. 46, pt. XL, § 113.

[22] LA. ADMIN. CODE tit. 46, pt. XLV, § 1907.

[23] LA. ADMIN. CODE tit. 46, pt. XLV, § 2907.

due to transient professionals as the practice of law, most other professions in the state of Louisiana welcome non-immigrant aliens. It strains reason to argue that a lawyer leaving the jurisdiction is different from a doctor or home inspector in terms of potential damage they may cause, or the disaster that goes unfixed as a result of a client having no recourse. Because there is no known record or evidence of such transiency problems in any of these other professions in Louisiana (or, indeed, in the legal profession for that matter), the justification for the newly-adopted interpretation of Section 3(B) is ephemeral.[24]

If this anti-alien interpretation of Section 3(B) is permitted to stand, Louisiana or any other state could assert the same unsupported transiency rationale to exclude all nonpermanent resident aliens from any and all licensed professions despite their lawful presence and right to work in the United States. In effect, Louisiana would be able to control how H1-B visas are granted to nonimmigrant aliens seeking employment in Louisiana. The negative implications are powerful for all nonimmigrant aliens, as well as all educational programs at Tulane and throughout the United States.

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[24] Even under rational basis scrutiny, the Fifth Circuit's decision—and Louisiana Section 3(B) as reinterpreted—should not survive constitutional scrutiny. *See, e.g., Raffaelli v. Comm. of Bar Exam'rs*, 496 P.2d 1264, 1275 (Cal. 1972) (holding that statute requiring U.S. citizenship for bar admission violated the Equal Protection Clause because "[t]he classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens of other countries."); *Application of Park*, 484 P.2d 690, 691-692 (Alaska 1971) (In assessing whether a citizenship requirement for bar admission was constitutional, the court analyzed whether there was a rational connection between one's fitness to practice law and citizenship; the court held there was no rational connection.).

II. THE DECISION BELOW HAS NEGATIVELY IMPACTED TULANE'S ADMISSIONS PROCESS.

Louisiana denies nonimmigrant aliens the opportunity to practice law within its borders. As a result, Tulane's international allure has been tarnished, affecting Tulane's ability to attract top talent, both internationally and within the United States. Following *In re Bourke*, Tulane has experienced a nine-percent decrease in international J.D. applicants and a forty-percent decrease in international LL.M. applicants. Tulane concedes that the events surrounding September 11, 2001 have likely contributed to the decline in foreign applicants. Given the events' negative impact on international recruiting, however, the recent decision further impedes Tulane's efforts to recruit international students.

Tulane's ability to attract foreign students directly correlates to Tulane's ability to attract top U.S. candidates. Almost half of Tulane's incoming class said that a main reason they selected Tulane was for its international law programs. Studies have shown that "[t]hese programs internationalize the student bodies of law schools which schools use as evidence of their international and even global characters . . . . [T]he significance of the international label addresses a law school's ability to attract applicants for its JD program as well." Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers* 15-16 (Working Paper 942) (2005), *available at* http://law.bepress.com/expresso/eps/942 (last visited Aug. 1, 2006).

Correspondingly, Tulane's ability to place foreign lawyers in employment, including employment in Louisiana, is causally related to the caliber of students that it attracts, whose characteristics, in turn, impact their success in finding employment. Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 Fordham Int'l L.J. 1039, 1057 (2002). "The more well-known a law school is among foreign lawyers, the more likely it can be selective

among applicants with regard to [student characteristics that impact their employment success]." *Id.* Accordingly, Tulane's ability to attract well-qualified foreign students helps it further promote its international programs. The decision has an undisputable negative impact on Tulane's ability to recruit top students.[25] A ruling with such negative potential impact on the education and practice of law in the United States requires this Court to grant certiorari.

III. THE DECISION BELOW IMPACTS THE QUALITY OF EDUCATION PROVIDED TO TULANE LAW STUDENTS.

As part of its treasured history and educational mission, Tulane and its students have always valued the benefits that result from the presence of international students inside and outside classroom. Research has verified the importance and benefits of all forms of diversity in the student body, including the benefits of multicultural and multiracial perspectives that foreign students bring to the classroom. *See, e.g.*, Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72(3) Harv. Educ. Rev. 330 (2002); *see also* Morgan Appel, et al., Association of American Colleges and Universities, *The Impact of Diversity on Students: A Preliminary View of the Research Literature* (1996). The decision below impedes the

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[25] "In the competition among U.S. law schools for transnational graduate students, it appears that location as it relates to bar admission rules matters. Schools located in New York are disproportionately successful in placing their graduates in jobs in New York." Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers* 30 (Working Paper 942) (2005) (discussing the requirements for international students who want to sit for the New York bar) *citing* Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 Fordham Int'l L.J. 1039 (2002).

ability to create and maintain such a diverse setting, disregarding this Court's prior statements and greatly impeding Tulane's ability to carry forward its mission.

International students in both the J.D. and LL.M. programs enroll in all classes at Tulane.[26] Tulane encourages this diversity in the classroom because international students bring a comparative perspective to share with other students. The benefits of student body diversity have recently been noted by this Court: "[t]hese benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (footnotes and citations omitted). Although the Court in *Grutter* addressed racial diversity issues, the Court still noted the importance of educating law students to do business in a global economy. "These benefits are not theoretical, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* The *Grutter* analysis is applicable to this case because, "[c]lassifications based on alienage, *like those based on nationality or race*, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (emphasis added). One of the best ways to train law students to practice law in a global marketplace is to have an internationally diverse student body, as Tulane has always endorsed.

Tulane's international students contribute significantly to the educational environment in numerous other ways. The international students often serve as special editors on Tulane's journals, assisting in the production of the many

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[26] Any limitations to enrollment are related to LL.M. and J.D. status rather than to international status.

articles published in these journals by foreign scholars.[27] The international students also teach popular courses on legal language to the J.D. students. In these legal language courses, the international students teach the vocabulary necessary for communicating in legal environments of foreign countries. The J.D. students are so motivated to learn from their fellow international students that they take these classes on a not-for-credit basis. U.S. students value the opportunity to learn from their international counterparts who have first-hand knowledge of the legal language being taught. They do so knowing that these courses provide valuable tools for their legal careers. Indeed, today many Tulane alumni use these skills as they live and practice abroad as members of the bars in a number of foreign countries.

Given the significant impact on the educational environment, combined with this Court's recent acknowledgment of the importance of providing a diverse educational setting to prepare lawyers to work in a globalizing world, this Court should grant certiorari to address the Fifth Circuit's decision, which causes a severe negative impact on the educational opportunities available to students, and disregards this Court's statements regarding the importance of a diverse setting for legal education.

IV. THE DECISION BELOW WILL DIRECTLY IMPACT THE QUALITY OF THE LOUISIANA STATE BAR AND THE LEGAL SERVICES THE BAR PROVIDES.

Fostering diversity is not merely for the purpose of conducting a classroom exercise. Tulane promotes student diversity in hopes that the benefits of exposure to varied perspectives will follow into legal practice. Tulane has made this a reality, and now has alumni practicing law in all regions

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[27] *See, e.g.*, Centennial World Congress on Comparative Law Papers, 75 Tul. L. Rev. 859-1245 (2001).

of the world. This Court has recognized the continuity between legal study and legal practice. *See, e.g.*, *Grutter*, 539 U.S. at 332-33 ("Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity."). Likewise, a primary aim of the Louisiana State Bar is to "encourage collegiality among its members."[28] The recent ruling prevents Louisiana practitioners from achieving that mission by denying nonimmigrant aliens living in Louisiana the opportunity to practice law, in contradiction to Congressional authorization.[29]

The variety and quality of Tulane's U.S. applicants could also be impaired as the number of qualified foreign students applying to Tulane declines. The negative impact of the recent ruling on Tulane's international program may discourage U.S. applicants from attending Tulane. As Tulane contributes significantly to the education of the members of the Louisiana Bar, any negative impact on admissions at Tulane is likely to impact the Louisiana Bar.

As this Court recognized over a quarter of a century ago, "[t]he 'increased specialization and high mobility' of today's Bar is a consequence of the dramatic change in the demand for legal services that has occurred during the past century." *Leis v. Flynt*, 439 U.S. 438, 450 (1979) (quoting *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1966)). Today, the globalized world economy demands that some lawyers practicing in the United States have particular familiarity with both domestic and international legal issues. In fact, "[l]awyers frequently represent foreign countries and the nationals of such countries in litigation in the courts of the United States, as well as in other matters in this country."

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[28] *See* Louisiana State Bar Mission Statement, *available at* http://www.lsba.org/association/association.html (last visited July 27, 2006).

[29] *See infra* footnote 34.

In re Griffiths, 413 U.S. at 724 n.14. In these cases, it is in the client's best interest that his lawyer understands both the domestic and international implications of their representation.

A qualified nonimmigrant alien attorney's innate understanding of his native legal system and culture will often make him best suited to assist U.S. clients in negotiating foreign legal issues.[30] Similarly, nonimmigrant alien lawyers are uniquely positioned to represent foreign clients in U.S. litigation or transactions. Moreover, nonimmigrant aliens are particularly situated to provide representation for other immigrants residing in the State. These clients are likely to feel more comfortable dealing with attorneys who are from their home country, and who understand their particular culture, situation, and needs. The Fifth Circuit's approval of the reinterpretation of Section 3(B) discourages international students from seeking the legal education necessary to effectively negotiate the U.S. legal system. As a result, non-immigrant aliens' specialized knowledge will not be utilized and U.S. and international clients will not benefit from their expertise.

The State's many immigrant, indigent, or underrepresented clients will be particularly harmed by the Fifth Circuit's ruling. Nonimmigrant aliens, like petitioners in this case, often represent U.S. clients that may not otherwise receive legal aid.[31] This Court has recognized the specific need for such lawyers:

> Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases,

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[30] Consider LA. REV. STAT. tit. 37, ch. 4 app., art. 14, § 11, which provides for licensing of legal consultants in foreign law.

[31] *See* Joe Gyan, Jr., *Court Hears Challenge to Lawyers Ban*, Baton Rouge Advocate (October 6, 2004); Susan Finch, *Judge Deals Setback to Foreign Lawyers: Ban from Louisiana Bar Exam is Upheld*, New Orleans Times Picayune (July 3, 2003).

> representation by nonresident counsel may be the only means available for the vindication of federal rights. *See Leis v. Flynt,* 439 U.S., at 450 . . . (STEVENS, J., dissenting). The lawyer who champions unpopular causes surely is . . . important to the 'maintenance or well-being of the Union,' *Baldwin,* 436 U.S., at 388 . . .

Sup. Ct. of New Hampshire v. Piper, 470 U.S. 274, 281 (1985). As exemplified by the present nonimmigrant alien petitioners, "[t]he interest these lawyers seek to vindicate is not merely the pecuniary goal that motivates every individual's attempt to pursue his calling," rather, "[i]t is the profession's interest in discharging its responsibility for the fair administration of justice in our adversary system." *Leis,* 439 U.S. at 452-53 (STEVENS, J., dissenting). The benevolent work by nonimmigrant aliens, like the petitioners, is frustrated by the Fifth Circuit's ruling in this case, and the Louisiana residents most in need will be negatively impacted, particularly in a time of great need for legal aid and assistance in the state of Louisiana.

V. THE DECISION BELOW WILL ADVERSELY AFFECT THE ECONOMY.

The Fifth Circuit's affirmation of the reinterpretation of Section 3(B) violates the Supremacy Clause because it directly contradicts federal law.[32] The result is a significant negative impact on the economy. As the Economic Report of the President recognizes, "high-skilled immigrant workers are a significant part of the skilled U.S. workforce. . . . Promoting a flexible and skilled labor force . . . through policies that attract the world's best and brightest to our shores . . . will ensure that the United States remains a competitive leader in

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[32] *See* Petition for Writ of Certiorari, *Wallace v. Calogero* (filed in the Supreme Court June 23, 2006) (No. 05-1645) at 11 (arguing that "Congress has established a comprehensive statutory scheme to govern the treatment of aliens and immigrants in the United States").

this rapidly changing world economy." 2006 Economic Report of the President at 57, 63-64. The Louisiana Bar's focus on the alleged transience of nonimmigrant aliens ignores the economic benefits of foreign workers, particularly given that there is no indication that nonimmigrant aliens disproportionately blight the legal community through lawyer nonfeasance or malfeasance.[33] Thus, the ruling below inhibits the promotion of a flexible and skilled workforce by preventing highly-skilled foreign workers from contributing to the legal community as members of the Louisiana Bar.

In addition to denying nonimmigrant alien lawyers the opportunity to seek state licensure,[34] the ruling also dis-

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[33] Furthermore, the reasoning of the Louisiana Supreme Court ignores the transient nature of other classes of citizens and immigrant attorneys that practice in Louisiana. For example, the Louisiana Supreme Court failed to articulate why nonimmigrant aliens are more susceptible to being "international transients" compared to U.S. citizens with dual citizenship living in their foreign country of citizenship, or even permanent resident aliens who maintain the citizenship of their home country. "A lawyer must remain accessible to his clients and subject to the control of the bar. . . . To begin with, however, the possibility that an alien lawyer might voluntarily return to his native land is not significantly different, in today's highly mobile society, from the possibility that a citizen lawyer might voluntarily move to a different jurisdiction in the United States, e.g., in search of better employment opportunities." *Raffaelli*, 496 P.2d at 1271-1272.

[34] An H-1B visa holder is admitted to the United States for the purpose of engaging in a specialty occupation, which includes law. 8 U.S.C. §1101(a)(15)(H)(i)(b). An alien is required to obtain "full state licensure to practice the occupation, if such licensure is required to practice in the occupation," and must have that license prior to approval of the H-1B visa. 8 U.S.C. §1184(i)(2)(A); 8 C.F.R. §214.2(h)(4)(v). The rationale that a nonpermanent resident alien is merely temporarily in the state ignores the Immigration and Nationality Act provision for adjustment of status which allows a non-immigrant alien to adjust their status to permanent resident. *See* 8 U.S.C. § 1255(a). For further discussion of violation of the Supremacy Clause, *see* Petition for Writ of Certiorari,

courages employer sponsorship of nonimmigrant aliens for legal, permanent residency. Between 2000 and 2004, about fifteen-percent of new permanent residents received green cards through employment-based immigration. 2006 Economic Report of the President at 60. In 1990, Congress enacted a priority system with employment-based categories for granting aliens permanent residence. One employment-based category makes available 40,000 visas per year to advanced degree professionals who are either sponsored by their employer, or who are of exceptional ability.[35]

State bar membership is a prerequisite to practicing law. By excluding nonimmigrant aliens from bar membership, the 2002 reinterpretation of Section 3(B) precludes such aliens from obtaining a nonimmigrant work visa to practice law even though federal law explicitly authorizes such visas for lawyers. If this interpretation is extended to other professional occupations, Louisiana would effectively eliminate federal nonimmigrant work visas from issuing for otherwise qualified nonimmigrant aliens residing and seeking to work in specialized professions in Louisiana.

Wallace v. Calogero (filed in the Supreme Court June 23, 2006)(No. 05-1645) at 11-15.

[35] *See* U.S. Citizenship and Immigration Services, Employment-based Permanent Residence, Employer Information Bulletin 14, March 16, 2005. Qualifying as an alien of exceptional ability must be demonstrated by a minimum of three of the following types of documentation: (1) Official academic record demonstrating that alien has earned degree(s); (2) Statement(s) from employer(s) demonstrating at least ten years of full-time experience in the field; (3) License or certification for professional practice; (4) Salary or other remuneration for services commensurate with that of a professional; (5) Membership in professional association(s); and (6) Recognition by peers or government/professional entities for achievements and contributions. *Id.* The reinterpretation of Section 3(B) sets up a conundrum not intended by Congress. Without a permanent resident visa, nonimmigrant aliens cannot qualify for bar licensure. At the same time, they will have difficulty qualifying for the visa without a bar license.

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416 (1948). This prohibition on advancement in the profession in turn will lead to lower employment and fewer employers willing to sponsor a nonimmigrant resident alien for employment based immigration. This cannot be the result that the Constitution permits, particularly in light of this Court's precedent regarding immigrants and the right to work. *See id.* at 419 (finding that statute denying lawful alien inhabitants the right to engage in an occupation violated the Equal Protection Clause and Supremacy Clause); *see also Truax*, 239 U.S. at 41-42 (holding statute that discriminated against resident invalid as denying equal protection and violating the Supremacy Clause under the law because lawful residents should not be denied "entrance and abode").

CONCLUSION

For all of the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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